AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XII NOVEMBER, 1926 NO. 11

Bar Associations and Judges

DURING the campaign preceding the recent elections the Bar Associations of a number of important cities throughout the country made a special effort to help secure the election of able judges. In fact, it has by now become a truism that this is one of the most important and pressing tasks which these associations should undertake; also that it is one to be undertaken in the face of no matter how frequent discouragements. The assistance in question generally took the form of indorsement of fit candidates at primaries, followed by indorsement of the most capable men on both tickets at the regular election. In Chicago nine out of the fourteen men recommended by the Bar Association were successful in the recent contest: the County Judge and the Probate Judge and seven out of twelve of the municipal judges. In addition, the association in that city got together a little army of about 300 lawyer volunteers and sent them to watch the proceedings at the polls in some of the city wards in which election corruption has been more or less the rule for many years. This group had as its chairman Mr. Urban A. Lavery. The reports from the volunteers are coming in and they may throw some interesting lights on the conduct of the election.

The entire judicial ticket of The Cleveland Bar Association was elected Tuesday, November 2, 1926, by the voters of Cuyahoga County. Only one of the Bar Association's candidates—Juvenile Judge Harry L. Eastman—experienced any difficulty in winning his election. The others were all elected by large pluralities. Eastman was elected by a plurality of 3,500 votes. The candidates endorsed by the Bar Association who were elected include Manuel Levine, Court of Appeals (unopposed); Thomas M. Kennedy, Walter McMahon, James B. Ruhl, Samuel H. Silbert and Harrison W. Ewing, of the Court of Common Pleas; George S. Addams, Probate Court, and Harry L. Eastman, Juvenile and Insolvency Court.

The Cleveland Bar Association has been making these campaigns since 1921 and has been very successful. Each year the Association conducts by mail a referendum on judicial candidates, the aspirants receiving the highest number of votes being declared the endorsees of the Association. The President then appoints a Campaign Committee. This Committee carries on activities to advise the people of the names of the candidates endorsed by the Association and it raises by contributions money sufficient to pay the expenses of the campaign.

One of the most effective activities carried on by the Campaign Committee was done by mail. Employees of the Campaign Committee called every member of the Association listed in the classified Cleveland Telephone Directory and asked him to write 50 personal letters to his very close friends, requesting them to vote the judicial ticket of the Association and to ask their friends to do likewise. A number of cards containing the names of the endorsees of the Association were enclosed. The Campaign Headquarters multigraphed the letter and attended to the mailing whenever so requested. A letter thus mailed on the stationery of a lawyer, over his signature, has a great influence. Many thousands of people were reached in this way.

On the day before election, 100,000 pamphlets —in the interest of the judicial candidates—and a ticket containing the names of the Association's endorsees, were distributed in 100,000 homes in the suburbs and in the city of Cleveland. Several hundred thousand campaign cards, bearing the names of the endorsees, were distributed. Advertisements were inserted in all the English papers and foreign language papers published in Cuyahoga County.

The "Flexible Tariff Case"

WHAT is known as the "Flexible Tariff Case" (J. W. Hampton Jr. vs. United States) was argued in the U. S. Court of Customs Appeals on Nov. 6, on appeal from a decision rendered last spring by the Board of General Appraisers, now the U. S. Customs Court. The case reached the latter body on protest against the Collector's assessment of duty. It involves an interesting and very important point as to the constitutionality of the provisions of the act in question which empower the President to proclaim such changes in classification or increase or decrease in rates of duty as, after investigation, he shall find necessary in order to equalize the cost of production of articles here and abroad (Sec. 315). In pursuance of this authority the President made or caused an investigation to be made of the comparative costs of production of barium dioxide in Germany and the United States and on the basis of the findings proclaimed an increase in the rate from four to six cents a pound.

Certain importers whose imports had been assessed on this basis thereupon attacked the proclamation before the Board of General Appraisers on the ground that "it was and is void and unconstitutional because done under an illegal delegation to the Executive Department of the power to legislate in violation of Article I of the Federal Constitution, and further, because it was done in violation of Section 8 of said Constitution, which vests in the Congress of the United States alone the power to tax." However, the Board sustained the constitutionality of the section in an opinion handed down by General Appraiser McClelland and a concurring opinion by General Appraiser Sullivan. Their conclusions are summed up in the following extract from the first named opinion:

> At this point it becomes pertinent to consider whether there was in thus empowering the President to determine and proclaim a rate of duty a delegation of legislative power and a delegation of the power to tax in violation of the Constitution of the United States.
>
> It is our view that the power thus vested in the President was definite and specific and left nothing to his discretion provided the purpose of the law clothing him with such power was faithfully carried out, and it is of course to be presumed the purpose of the law was faithfully executed. Before determining whether he should proclaim any change in the rate of duty on barium dioxide the President was required to find the fact of difference between the cost of production in the United States and in Germany on barium dioxide after investigation and opportunity given to parties interested to be heard. Depending upon the proofs presented and the facts ascertained upon investigation it might have been definitely found that the difference in cost of production was anywhere, as we have said, from 1 to 50 per cent more than the rate being assessed under the tariff law in operation. The President's finding was that the actual difference was 50 per cent and having so found there remained in him no discretion as to the rate of duty he should determine upon and proclaim imported barium dioxide should be subject to after the expiration of 30 days from the date of such proclamation.
>
> In thus finding and proclaiming a duty of 6 cents per pound on barium dioxide the President did not legislate nor impose a tax. In what he did he simply carried out the expressed will of Congress.

General Appraiser Brown filed a dissenting opinion in which the questions at issue were discussed at length and the conclusion reached that the provisions were unconstitutional. He called attention to the extent of the power attempted to be granted the President and to the alleged actual impossibility of determining the difference in cost of production of an article here and

abroad (citing various economic authorities). He therefore concluded that:

> Any generalization from such varying factors, however intelligently and painstakingly arrived at by executive authority, must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the findings are themselves variable and uncertain it is impossible that the generalization from them could attain to greater certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury. . . .
>
> No amount of administrative findings by the most brilliant and painstaking Tariff Commission (which their published reports under section 315 show the commmission to be) can render certain a legislative rule, declaring a policy for the future, which depends upon such factors inevitably fluctuating from day to day. Nothing can be made certain which inherently involves uncertainty.

He then proceeded to analyze and differentiate certain cases from the one at bar, showing that the easily ascertainable facts on which Congress conditioned the exercise of certain powers furnished no precedent in the present instance, and after further discussion reached the conclusion that:

> This should clearly demonstrate that the complicated quasi-judicial *form* of the novel process here provided for, before and by the Tariff Commission (an arm of the Executive) for determining differences in production costs, as to such articles as they, in their discretion (or upon the President's suggestion), shall choose to so determine, as a result of such hearings as they shall have, plus the results of such necessarily ex parte investigation as they must employ, plus a further discretion to the President to follow their findings, and declare the equalizing tax, or not, as he sees fit, after consulting others if he desires, and later to revoke the proclaimed rates when he so decides, is nothing more than a complicated machinery for the taxation of the citizen by executive judgment and discretion and as such plainly an unconstitutional delegation of legislative power.

He then proceeded to discuss the question whether a tax which "upon its face" is levied for protection is within the taxing power of Congress, stating the issue thus:

> Moreover, the plan before us is beyond the power of Congress even if it is not held to be an illegal delegation of legislative power, for it purports upon its face to make a levy for a private purpose. It can not be denied that a tariff based upon differences in foreign and domestic production costs executes a frankly declared protective policy. Let this phase of the issue be clearly stated. It is whether the levy itself, laid ostensibly for what we call "protection," and frankly not for the purpose of raising revenue, falls within the definition of the term "tax," levied to pay the debts and provide for the common defense and general welfare of the United States, for which alone authority is given to Congress.

His discussion leads to the conclusion that the provisions are unconstitutional on this ground also, though the practical impossibility of attacking a protective act which does not carry this as principal object "on its face" does not appear to be challenged. He concluded with the following criticism of the majority view:

> If the majority conclusion is right, the Congress, by declaring a few general principles of taxation, can abdicate the substance of its legislative trust over that entire subject and pass its representative responsibility over this *power to destroy*, to bureaus and commissions (fortified by presidential proclamation); thus leaving the people, their business, and their property entirely at their mercy, and necessarily without court review of their taxing discretion. This, in my opinion, is not the American form of representative Federal Government which the Constitution established; at least not the kind I was brought up to believe in.

ISLAM AND THE OREGON PUBLIC SCHOOL LAW

The Learned Sheik, Muhammad Bekhit, Former Grand Mufti of Egypt, Prepares a "Fetwa" Setting Forth Superior Rights of Education of Children Possessed by Muslim Parents as Against the State—Mother's Authority Comes First During Impressionable Period—Views of Sheik Mahmoud Ibrahim—Arabic Press and Dayton Trial

By Hon. Pierre Crabites
Judge of the Mixed Tribunals, Cairo, Egypt

"IMITATION is the sincerest flattery. Why should we when in all essentials you are copying us?" This was the quick retort which I received from one of the Sheiks of Al Azhar when I asked him whether his collegiate mosque contemplated becoming part of the great Europeanized Royal Egyptian University. But after having dealt me this body blow he added: "You and I are friends of long standing. You know the East too well to have asked me this question unless you are ruminating about something. Sit down and let us have a heart to heart talk." And so we did. When I left him the evening star was twinkling. It seemed to wink furtively at me and then again to whisper in my ear, with tantalizing emphasis, those words of Oliver Goldsmith which proclaim that:

"Truth from his lips prevail'd with double sway,
And fools who came to scoff remain'd to pray."

It was, however, very unfair of Venus to play such pranks upon me. I love the East with a fondness that binds me to her with hoops of steel. I really had not "come to scoff" although I did remain "to pray."

Nor was this the first time that Sheik Mahmoud Ibrahim and I had discussed the problem of education. We had already gone over the subject on other occasions. Some three years ago we had, in fact, considered a concrete proposition, that of the Oregon Compulsory Public School law. I was very much interested in the issue opened up by this enactment. It forbade parents from sending their children between the ages of 8 and 16 years to what are known as parochial or denominational schools. I wanted to get the reaction of Al Azhar to such a statute. I, therefore, took up the matter not with one but with several Sheiks, among whom was my interlocutor. He knew that I had submitted the Oregon law to Sheik Muhammad Bekhit, the former Grand Mufti of Egypt, and that the *fetwa* delivered to me by that distinguished Doctor of Laws had carefully gone into the subject. Sheik Mahmoud Ibrahim therefore lit right into me and carried the war not into Africa but into America. "Your ideas about education are radically wrong," said he. "You subordinate the family to the State. You forget that parents have paramount rights. I know that you told me that your High Court has nullified that foolish law we discussed three years ago. But I cannot take much stock in schools which turn out such stupid legislators."

I did my best to get my friend to see our view point. He listened with great courtesy and replied: "You have told me that you are preparing a paper for one of your American magazines. Do not, therefore, waste your time in attempting to convert me to your ideas. Let your readers understand our way of looking at things. Put Sheik Muhammad Bekhit's *fetwa* before them. Let them read it in full. Tell them what is meant by a *fetwa*. Let them judge from the complete text of that document how Islam handles the problems which confront you."

I feel that I must comply with the request thus made of me. It would be a work of supererogation to give a definition of the Arabic word "*fetwa*." All who are interested in the East understand that the term applies to what I might describe as a reasoned professional opinion given by an *Alim* or Muhammadan jurisconsult upon a question of Islamic law. Sheik Muhammad Bekhit was not only for years Grand *Mufti* of Egypt, but he is universally revered for his high character and outstanding scholarship. A *fetwa* signed by him is, therefore, a pronouncement of transcendant merit. Muslim practice requires that a *fetwa* consist of a specific question and of a categorical answer. I shall, therefore, submit the inquiry and the reply elicited by it. Here they are: The latter exhales the perfume of the East, crystallizes the civilization of the Orient and puts us into touch with principles which should make us stop and think.

Question:

"To His Eminence the learned Sheik Muhammad Bekhit, former Grand *Mufti* of Egypt:

"Pierre Crabitès has the honor to submit to your Eminence the following questions. It is asked that a reply be given to them:

"'Under Muhammadan law has a father or guardian the right to send his children or wards to any school chosen by him where the curriculum contains naught contrary to his religion, good morals or the public polity of the state?'

"'May the State or any public authority validly prevent the father or guardian from exercising this right?'

"Pierre Crabites."

Cairo, June 9, 1923.
(Original signed.)

Answer:

"In the name of Allah, the Clement and the Merciful. Allah alone be praised. Prayers and Salvation for Him since Whose coming there have been no Prophets.

"Having taken cognizance of the two preceding questions we declare that the principles of Muslim

law vest the right of the education of a minor in his or her uterine relations, the whole as hereinafter provided. The reason for this is that minors are unable to look after their own interests. The lawmaker has, therefore, enquired into the matter. Islamic jurisprudence and the Doctors of Muhammadan law have accordingly very properly insisted that the education of the minor who has not reached the age of reason must be confided to the relatives best qualified for looking after his or her needs, that is to say to the women of his or her maternal stock. First in this category comes the mother herself, as was decided by the Prophet Himself—may Allah bless him and proclaim him—when a woman came before him and said: 'O Messenger of Allah, this is my son whom I have sheltered in my womb, rocked upon my knee and nourished at my breast. His father has divorced me and wishes to take my child from me.' The Prophet—may Allah bless Him and proclaim Him—said unto her: 'Your right primes that of your husband unless you contract a second marriage.'

"And next in order comes the grandmother, the mother of the mother, as is shown by the following case in point: Omar—may he be in the good graces of Allah—in divorcing his wife Djanila, daughter of Assem, departed with his son Assem. The child's grandmother, the mother of Djanila, overtook Omar and seized the boy. The grandmother and father thereupon submitted their grievance to Abou Bakr Al Saddiq—may Allah be satisfied with him—and he said unto Omar: 'do not interfere between him and her for her saliva is better for him than any honey or nectar that you, Oh Omar, may give him.' And the child was forthwith delivered to his grandmother. All of this took place in the presence of the Companions of the Prophet. And this right passes in like manner to the female relatives of the maternal stock of the mother according to the order of succession established by Muslim law.

"In default of female relatives of the maternal branch the right of education passes to the consanguine relatives of the masculine sex. In the first rank come the ascendants, that is to say, the father, the grandfather (father of the father) the german brothers, the consanguine brothers, the german nephews, and the consanguine nephews, etc., etc.

"If there be several relatives who thus have the right of educating the child preference must be given first to the most capable, secondly to the most pious and thirdly to the eldest. All of the foregoing applies to the child who has not reached the age of reason. This is fixed for boys at the age of seven and for girls at nine. This additional period is decreed for girls in order to enable them to understand how to keep house.

"Once the minor, boy or girl, attains the age of reason he or she must be confided to the father. If this parent refuse to accept this charge he may be constrained to assume it because the child has rights which its father must respect. If the minor be a boy who has attained the age of reason it is necessary that he acquire such knowledge as may be useful for him in respect of his religion and in order to prepare him for the battle of life. Should the child be a girl the father is called upon to give her this self same instruction and also to preserve her and care for her. It is clear that the father is best able to fulfil this duty. Should he have passed away the child's paternal grandfather is charged with this responsibility. The same principle, in a word, is applied as that set forth in respect of a child who has not attained the age of reason.

"All this is primarily taken from the word of Allah as expressed in His Holy Book which is the Qurân. It is there decreeed that relatives in general, whether they be or be not consanguine, enjoy in virtue of the right of relationship a priority in respect of the administration of all the interests of the minor, whether they be pecuniary or otherwise. So has Allah written, ordained and judged.

"The State therefore has no power over a minor as long as there be a relative who fulfils the the foregoing requirements.

"If there be no such relative the attributes in question become vested in the sovereign, for the head of the State enjoys a general right in regard to all who owe him allegiance. The right of relatives is however special and not general. It is special because it applies simply and solely to the exercise of parental authority over specific relatives. The revered verse shows that the special guardianship flowing from ties of relationship primes the general tutorship of the sovereign. It therefore follows that the father of a minor or in his place the legal guardian chosen from among the relatives of the child takes precedence over the Sovereign in all matters affecting the education and upbringing of the child.

"The reason for the existence of parental authority over the child being that the minor is unable to look after its own interests it follows that it is the duty of the father or guardian to give the ward an education which will be beneficial to the infant. The father or guardian therefore is prohibited from giving his pupil an education which might or could vitiate his morals, teach him anything contrary to his religion, or which is opposed to the public polity of the State.

"From the foregoing principles it follows that under Muhammadan law authority is vested in the father or guardian of a minor to send his child or ward to whatever school he may elect in order that the minor may there learn all sciences which are not contrary to the religion of the infant, to morality or to public order.

"Neither the State nor any other authority may under Muhammadan law validly prevent the father or legal guardian of the child be it boy or girl from exercising the rights herein before defined."

1 Al Radah 1341 (corresponding to June 15, 1923).

(Original signed and sealed) MUHAMMAD BEKHIT, former Grand Mufti of Egypt.

As soon as I had finished my translation of this *fetwa* I reread the opinion handed down by the Supreme Court of the United States in the Oregon school cases. And then an idea struck me. It was this. I shall submit this decision to Sheik Mahmoud Ibrahim and hear what he has to say of it. I was afraid to trust my Arabic to so severe a test so I had a competent translator accompany me. My Muhammadan friend listened with the utmost attention. He interrupted the reader once or twice and had him go over certain passages a second time. When the task had been finished the Sheik arose, took the interpreter by the hand, thanked him and walked with him towards the door. It was

clear that the *Alim* wanted to be alone with me so that he could unburden himself. I therefore dismissed the third man. As soon as the latter had left, Sheik Mahmoud Ibrahim turned towards me and said: "I knew that your Judges would never look at the question as we do. They talk of the destruction of a 'remunerative business,' and they have never once quoted their Vangile (meaning the Bible). They say something about guarantees against the deprivation of property without due process of law or some such jargon which I do not understand. It is a matter of money with you. God's wishes you have not consulted." I tried my best to get the old gentleman to see that the Court had distinctly said that "the child is not the mere creature of the State: those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations." His refrain however was: "Then why talk so much about money and the law ruining the business of the teacher?"

While, of course, I do not agree with such criticism yet I must say that I am able to follow the Sheik's angle of observation. I see in this Supreme Court decision and in this Muslin *fetwa* the concrete expression of two divergent mentalities, the clash of two worlds, the shock of two civilizations. I do not attempt to decide as between them. I admire the pellucid reasoning of Mr. Justice McReynolds. I pay homage to the logic of Sheik Muhammad Bekhit's argument. Both men are valiant champions of their peoples. Both of them have brought to their task an impartial mind, deep learning and an abiding sense of equity. They have both reached the same conclusion. They have traveled by different routes. "Truth" as Bacon said "is the daughter of Time." Truth stands out in both definitions of principle because certain primary conceptions of right and wrong are immutable. It is however in surveying the route followed by both schools that one is best able to g a u g e how radically different the path may be but how constant is the final goal. As my readers are fully conversant with the scenes traversed by the eminent Washington jurist I think it better to devote more especial attenion to the Islamic train of thought.

The reasons for judgment adduced by the Muslim Doctor of Laws recall to my mind the philosophy of Aristotle. I hope that my love for the East has not entirely wiped out my classical training. I therefore trust that I am correct in asserting that it was the peripatetic group which so stoutly defended the primacy of the family. At all events the principles enunciated by Sheik Muhammad Bekhit unequivocally proclaim a doctrine which is against the drift of the present current of Western thought. I shall not attempt to point out how, in ancient Rome, law, religion and administration emanated from one center and were directed towards one end. That center was the imperial will and that end was universal dominion. Nor shall I seek to show, as David Jayne Hill does with such mastery, how the struggle began for a world wide Empire, how this gave way to the establishment of territorial sovereignty, and was in turn followed by the age of absolutism and successively by that of revolution and constitutionalism only to be supplanted by the strife for commercial mastery. I shall, on the contrary, content myself with saying that if in 1783 the American colonies were recognized as free, sovereign and independent states the Civil war converted our constitution into an indestructible union of indestructible states. In a word in America the tendency is towards centralization. The states may no longer claim to be able to nullify a law of Congress, suffrage has ceased to be solely within the control of the several commonwealths and a man's thirst may not now be quenched except according to regulations edicted at Washington. The Orient, on the contrary, in accepting the family as the unit of society and in adhering to the mother and the father as the primary sources of authority in all that concerns the welfare of the child is holding out against centralization, legislative tutelage and bureaucratic pin-pricking.

But I read far more into this *fetwa* than the mere preservation of the sacred prerogatives of mother and father. I see in it abounding proof of the exalted position given by Islam to woman. I am writing this as a man who knows that Anglo-Saxon civilization was formed in a mould which takes its cue from the principle affirmed by Blackstone that "the very being or legal existence of the wife is suspended during marriage or at least is incorporated and consolidated in that of her husband". This means that except in so far as our legislator may have interfered, an American wife is both a blotting paper which absorbs her husband's words and a phonograph which recalls her master's voice. This has, I know, been changed but the starting point is there. The basic formula is as I have given it. If a woman is proud of her Anglo-Saxon lineage she should be willing to accept all that goes with it. The Muslim wife however need not be ashamed of her forbears. There is therefore in respect of woman's status a radical difference between what I might style the intuitive, subconscious and hereditary viewpoint of the two civilizations, the one represented by the distinguished Associate Justice and the other typified by the erudite former Grand *Mufti*.

For a moment or two I was somewhat nonplused by the division of authority between the maternal and paternal lines so punctiliously insisted upon by Islam. It seemed to me to be somewhat arbitrary. I had no difficulty in grasping why the mother was given precedence over the father in respect of the child of tender years. I followed the line of reasoning which led the Prophet of Islam to entrust to the father the minor who had attained the age of reason. I saw clearly why the grandmother of a very young boy or girl was deemed to have a right superior to that of the father of such an offspring. I divined the motive why in other cases the grandfather had the first call. What flabbergasted me nevertheless was the rigidity, the inflexibility and the constancy of the rule which made the mother's right carry with it as a corollary that of the women of the maternal line and the prerogative of the father beget a like attribute in favor of the men of the paternal branch. Seeing things through occidental spectacles it appeared to me that in all cases where the rights of the mother were deemed paramount there should be no inherent reason for excluding the paternal grandmother or in the contrary instance for brushing aside the maternal grandfather. In a word my Western

point of view made it difficult for me to follow the line of cleavage so scrupulously traced.

But I had lived too long in the East to stick to the glasses I brought with me from home. I discarded them and sought to study what was written in the light of the Rising Sun. I had an abiding faith in the common sense of the Prophet. I was aware of the fact that the Gospel according to Saint John teaches that the Saviour turned water into wine and that notwithstanding "this beginning of miracles," the United States, in the twentieth century, followed Islam into the Prohibition camp where the Muhammadan world had been since A. D. 623. I knew that we now have woman suffrage and that we were thus imitating the Muslim emancipation of woman. I had read the Supreme Court's decision in the Oregon school cases and had learned from them that even if we favor centralization, standardization and polarization there are still judges not in Berlin but in Washington who defend the supremacy of the family. I was therefore certain that what appeared to be arbitrary and capricious was really a logical deduction from carefully thought out premises.

My study of the difference between "personal law" and "territorial law" soon put me on the right track. My investigations made in that connection taught me that Islam tends to divide the inhabitants of a given geographical unit into water tight compartments each with its own judicial essence, laws and officials. It therefore was relatively easy for me to perceive that this same principle of insulation was applied to the rights of the mother and of the father in reference to their offspring. Once this notion percolated into my cranium the rest was easy sailing. And here is how I recapitulate this phase of Muslim civilization.

There is no fusion between husband and wife. Each has and preserves his or her own property. The same dominant postulate is applicable to father and mother. The mother is given the cream and the father the skimmed milk. I mean by this that the mother is accorded the control of the child when its mind is particularly plastic, malleable and impressionable. Saint Ignatius Loyola is reported to have said: "Give me the child until it is seven and you may have it forever afterwards." I have seen no such statement in any recognized biography of the great Jesuit but the quotation has about it the ring of probability. Be that as it may the Oriental marries at so young an age that when Muhammad gave the mother control over the boy until he was seven and over the girl until she was nine the Prophet turned over loaded dice to the father. He meant to make the imprint of the mother upon the mind and soul of the child both deep and durable. To clinch this hegemony of the mother he did not propose that any of her in-laws, male or female, should have any chance to remove the spirit of her influence should death call her away. Having reached the decision that the mother's personality should dominate what he considered the crucial and formative period of the child he carried, I repeat, his "Safety First" policy to the point of insuring this spiritual ascendency of the mother even in the event of her demise. But the founder of Islam did not deprive the father of his "last clear chance". Muhammad may have given the child's procreator skimmed milk but fair play required that man be allowed to drink it without interference.

I do not say that I approve of any such hard and fast rule. My individual preference has nothing to do with my bald recital of facts. I may be permitted however to point out that the tenets which I have just set forth were defined over 1300 years ago. We, of the West, have not as yet so systematized things. Our institutions do not say how far the paternal authority goes or where the maternal control enters. We have no hard and fast rule as to the allotment of children in the case of divorce. We introduce into such matters the element of personal equation. I do not mean to imply aught in derogation of the impartiality of our judges. I do not say that indigestion, insomnia or inadvertence may decide the fate of a child. I simply insist upon the radical difference underlying the social structure of Islam and that of Christendom.

The East works along lines of special franchises, staked out preserves and reserved compartments. I shall not attempt to elaborate this point. I think that I have already said enough to make my meaning clear. I do feel justified, however, in insisting that this "personal law," this distinction between maternal suzerainty and paternal dominion, this segregation of a wife's purse from her husband's wallet, all of this accounts for the status of woman in Islam. It explains the meaning of her veil. As I see things this flimsy filament is a symbol. As I read the psychology of the Orient the lines of demarcation between man and woman, between the world and the harem, between the seen and the unseen is the inevitable complement of an economic structure which is foreign to the genius of the Occident. We cannot fathom why the woman of Islam should be secluded because the predicate upon which Sheik Muhammad Bekhit bases his argument is unknown to our philosophy. Promiscuity underlies our social fabric. Consolidation not in the sense of the modern trust but interpreted as implying cooperation, mutuality and solidarity forms the cornerstone of our institutions. We therefore have grave difficulty in grasping that if woman is kept away from man he is excluded from her. He is as much isolated from her world as she is exiled from his. She is no more a recluse than he is an anchoret. It is not a bar sinister which hides her from your view and from my sight. It is simply and solely the impenetrable interlocking apparatus known as Islam which does not admit that a father may impinge upon the prerogatives of a mother, a husband upon the privileges of a wife or the State upon the rights of a guardian and which carries this axiom so far that men and women find themselves, like oil and water, unable to mix. If in the sanctity of the home family life obtains it is because self perpetuation is the second law of nature and because men and women must consort somewhere otherwise the race would be no more.

In the light of these general observations it may be assumed that Al Azhar typifies a psychology which is in many ways radically opposed to ours. To introduce a Western curriculum into such an institution and to seek to have it harmonize in any essential with Occidental ideals would be a most drastic measure. "Do not forget," said Sheik Mahmoud Ibrahim to me, "that education is a

means and not an end. You are copying from us more than we are borrowing from you. Why should we commit suicide today when you Americans have just admitted by your Prohibition law that the Prophet Muhammad was right when he made Islam dry 1,344 years ago? It took you a long time to find out a truth which we have always known." And then he grew pensive. I knew from the look in his eye that he had something more to say so I was not surprised when he added: "You are a judge of the Mixed Tribunals. You apply French law. Do you know why Nappleyun (Napoleon) came to Egypt?" I said that I did not. "It was," he replied, "because he wanted to compile his codes. He therefore came here to study the Qurân. Your laws have many good points because he took them from the Qurân. They have many bad features because he did not stick to the Qurân. You, therefore, both as an American and as a judge of the Mixed Tribunals, should be the last person in the world to expect Al Azhar to borrow anything from a civilization which is continually coming to us for light." I do not say I agree with so sweeping a statement. It gives one, however, a mental picture of another world and emphasizes that clash of civilizations which is a subject of such absorbing interest.

I was hard at work putting the finishing touches to this article when my front door bell rang. A few seconds later I was vexed to hear my *suffragy* knock at my door. He announced that Sheik Mahmoud Ibrahim wanted to know whether I could receive him. My irritation gave way to a smile of pleasure because I am very fond of my Al Azhar guide, philosopher and friend. Besides I knew that this unexpected visit must have had some impelling motive back of it. The big bundle of newspapers under the arm of my visitor soon told me I was not mistaken. "I have brought all of these for you," said he, placing upon my desk a batch of marked Arabic dailies and a magazine. There were several issues of the Mokattam, of the Ahram and of the Siyassa and a copy of the Flourishing Review. "Read these," added the Sheik, "they'll tell you why we do not want Al Azhar to adopt your new fangled notions." It would have taken me a month of Sundays to have waded through these columns but their headlines told the tale and the photograph of Breeann (Bryan) in the magazine confirmed the message. All of this printer's ink dealt with Dayton, Tennessee, and with the monkey law. It left upon the Muslim mind the picture of a bitter religious war centering around education with William Jennings Bryan standing out as the champion of revelation. .It told of a battle between contending forces and the death of the Commoner gave the story a dramatic flavor. This write-up convinced the Orient that wicked men were fighting Orthodoxy and that a martyr had died in the trenches.

We should not think that the religious leaders of Islam do not read the daily papers. We should not imagine that the publishers of the Orient do not understand the art of coloring news. We should on the contrary reconcile ourselves to the fact that practically as much ill-digested knowledge is doled out to the Oriental about the West as we manage to absorb in regard to the East. When, therefore, a concrete case arises in Europe or America which furnishes a background for pro-Islamic propaganda it finds its way into the newspapers with a wealth of distortion which would make a yellow journalist of New York green with envy. It accordingly follows that the dominant men of the East think that they know a great deal about the "anti-Congregation" laws of France, the removal of the crucifix from the Italian schools by the orders of the old Italian political parties and the reintroduction by Mussolini of Him Crucified. They have heard of the Oregon legislation and of the Tennessee statute. They are aware of the fact that Christendom is divided into sects and factions and that when the Turks besieged Constantinople the Greeks cried out: "Better the turban of Muhammad than the hat of a cardinal." As one of my colleagues so aptly expressed it, "If you really believe that Islam is sick why can't you doctors agree upon a prescription?" Here is the kernel of the difficulty: if Al Azhar were to desire to steer towards the West, it is convinced that it can find no reliable compass. Frankly, I am satisfied that our dissensions are so manifold that Al Azhar has ever before its mind the words of Phaedrus, the Roman fabulist, who said that "it is better to submit to the present evil, lest a greater one befall you".

AMERICAN BAR ASSOCIATION
Committee on Supplements to Canons of Professional Ethics
ANNOUNCEMENT

The Executive Committee of the AMERICAN BAR ASSOCIATION, at its recent meeting in Denver, authorized the following announcement:

Pursuant to the recommendation of the Committee on Supplements to Canons of Professional Ethics, in its annual report to the American Bar Association, the Executive Committee has authorized this publication of an offer to all members of the American Bar Association who so desire, to subscribe to "Annotated Canons of Legal Ethics" (a pamphlet of 280 pages) prepared by the Chairman for use of the Committee. The subscription price is $1.00. The book will be bound in uniform style with annual reports of the Association.

Subscriptions accompanied by a remittance of $1.00, will be received at the office of the Secretary of the Association, William P. MacCracken, Jr., 919 The Rookery, 209 So. La Salle Street, Chicago, Illinois, until December 31, 1926.

When the number of subscriptions is thus ascertained, an adequate edition will be printed and the type distributed.

Subscribers may expect to receive their copies at the addresses given by them shortly after January 1, 1927.

CHARLES A. BOSTON, Chairman,
24 Broad Street,
New York City.

INTERNATIONAL LAW ASSOCIATION MEETS IN VIENNA

THE 33rd Conference of the International Law Association was held in Vienna on August 5-11, 1926. The Conference was presided over by Gustav Walker, President of the Court of Claims. The Honorary Presidents of the Conference were Dr. Rudolph Ramek, Chancellor of Austria; Dr. Leopold Waber, Austrian Vice-Chancellor and Minister of Justice; Dr. Julius Roller, President of the Supreme Court, and Dr. Josef Schey, Professor in the Vienna University. Dr. Walker was subsequently elected President of the International Law Association until its next conference.

Over two hundred delegates took special boat from Linz on the Danube to Vienna. The excursionists starting on August 4th, passed the most picturesque part of the Danube and were officially welcomed by the City of Vienna upon their arrival there, the next day.

The Conference opened on August 5th in the throne room of the Imperial Palace (Die Hofbourg). Speeches of welcome and addresses were made, including the inaugural address by Dr. Walker and the report of the Executive Committee of the Association. The next day the Conference got to real work at the Chamber of Commerce, where all the business meetings of the association were held. The work of the Association included as usual, both the Public and Private International Law. In the field of Public International Law, the conference dealt with codification of International Law, the law of Territorial Waters and Neutrality, the establishment of Permanent International Criminal Court, Protection of Private Property, Protection of National Minorities, Aviation Laws. In addition the following papers were read on the subjects of International Public Law: Representation of States. (Right Hon. Lord Phillimore); Das Volkerrechtliche Gesetzbuch. (Dr. Friedrich Wilhelm v. Rauchhaupt); Projet d'une Convention sur l'immunité en droit international. (Karl Strupp); Extradition. (Dr. M. Paleweski); Condition juridique des navires de commerce dans les ports. (Dr. Niboyet); Determination de la juridiction compétent a l'égard des litiges nés a l'occasion des contrats conclus entre Etats et ressortissants d'autre état. (Dr. M. André Prudhomme).

The Conference dealt with the following questions of International Private Laws: C. I. F. contracts, Conflict of Law in regard to Contracts, Rate of Exchange, Commercial Arbitration, International Bankruptcy, Social Insurance, and Unfair Commerce.

The Conference accomplished considerable results. It succeeded in placing itself on the record in favoring the establishing of International Criminal Court as a section of permanent court at The Hague whose jurisdiction shall be limited to crimes either enumerated in the court rules or mentioned in special international conventions establishing the Court. The Conference adopted a series of resolutions strengthening and elucidating present rules of international law in regard to private property. The Conference, after careful and lengthy deliberation, drew up a text of an International Convention providing clear and simple rules for the determination of proper law applicable to private contracts where conflict of various laws arises. This is the first instance when a unanimous agreement was attained by lawyers of all countries upon this important matter. The Convention established entirely new rules in this respect, doing away with heretofore existing rules of *lex loci contractus, lex re sitae* and *lex solutionis*. The Convention instructed its Committee on Unfair Commerce to prepare for the next meeting of the Association a convention dealing with trusts, and other unfair methods of commerce. Finally, the Convention adopted a complete set of rules for determining the exchange value of foreign currency in all situations whenever such question arises.

The lighter side of the Conference included receptions by the City of Vienna at Cobenzl, by Dr. Heinrich, the President of the Austrian Republic, at Semmering, and Dr. Waber, the Vice-Chancellor, at Schönbrunn Palace. Visits and excursions were arranged to the Castle Laxenburg, the last residence of the last Emperor of Austria (Charles VI) and the Castle of Kreuzenstein, to Schneeberg and Rax in Tyrol, to Wienerwald including Heiligenkreuz and Baden. It is needless to add that both State and City authorities in Vienna and the Austrian lawyers treated the delegates with the proverbial Viennese hospitality and charm of manner.

After the close of the Conference about 150 delegates paid official visit to Budapest, where they were guests of the municipality and the Hungarian Government. Receptions were held in their honor by the municipality of Budapest, and Hungarian Ministers of Justice and Foreign Affairs.

The American delegation consisted of Mr. and Mrs. Arthur J. Barratt and daughters (London), Mr. Lucien A. Boggs (Jacksonville, Fla.), Mr. Chauncey Brewer (Boston), Mr. P. P. Campbell (Washington, D. C.), Mr. John E. Crowley (Boston), Dr. Simon F. Curran (Dorchester, Mass.), Judge John C. Horn (Lamar, Colo.), Mr. Alexander Karlin (New York City), Mr. W. E. Kay (Jacksonville, Fla.), Mr. Borris M. Komar (New York City), Elaine Lomas (Rome), Mr. and Mrs. Joseph F. O'Connell (Boston), Mr. and Mrs. Amos J. Peaslee (New York City), Mr. Eugene Van Voorhis (Rochester, N. Y.), and Mr. Edmund A. Whitman (Boston).

There were present at the conference over 400 members of the Association and their guests. As is usual in conferences of this type, the greatest benefit is an opportunity of learning views of other people and the acquisition of habit of reconciliation and co-operation in attempting to steer a middle course among sometimes widely divergent views. Besides learning to respect other men's opinions and teaching them to respect your own, the Conference helped many of the delegates to form new personal friendships with men in their profession and to renew old ones.

BORRIS M. KOMAR.

CONSOLIDATION OF RAILWAY PROPERTIES

Significance of Pending Amendments to Transportation Act of 1920 Recommended by Senate Committee Last April—Policy of Present Act as to Consolidations—Promulgation of Tentative Plan by Interstate Commerce Commission—Various Modifications of Act Sought—A Question of Method

By Edward C. Wade, Jr.
Member of the El Paso, Texas, Bar

THE proposed amendments to the Transportation Act of 1920 recommended by the Senate Interstate Commerce Committee on April 5th of this year for passage by Congress, are of profound importance and if enacted into law will serve to make substantial changes in the structure of that Act.[1]

The Transportation Act of 1920[2] itself marked a distinct departure in the policy of the country with reference to its railroads.[3] That Act not only enlarged the power of the Interstate Commerce Commission, but it sought by compulsory methods to consolidate the railroads of the country into a limited number of competitive systems. These consolidations were to take place upon mandatory order of the Interstate Commerce Commission in conformity with a general plan to be promulgated by the Commission.

The amendments if adopted will postpone the formulation of the plan of consolidation for a period of at least five years, and there is a possibility that it will never be promulgated. Moreover, the changes proposed will entirely discard, for the five year period, the idea of compulsory consolidations. The Commission, however, is to be left with power to authorize voluntary consolidations during the five-year-period when initiated by the railroad companies interested. It is, therefore, not too much to say that the policy of the Government in the matter of consolidation has undergone, in recent months, a decided change, and it is possible that the basic theories upon which the Act of 1920 was erected are about to be overturned.

Of course, the amendments contemplate that at the end of the five-year-period fixed, the country will return to the principle of compulsory consolidations as set forth in the original Act, but there is support for the belief that the Act will again be amended before the expiration of the period, entirely eliminating the compulsory features. It is clear, however, that the compulsory provisions of the Act, by the amendments, will be suspended for a period of five years. Furthermore, the authority of the Commission under the proposed new law will again be substantially enlarged, in its power to authorize consolidations without reference to their connection with the country as a whole. In other words, the Commission in passing upon a given consolidation need not look beyond the result to the immediate territory, and need not approve such consolidation with reference to a complete plan.

The history of railroad legislation in this country is one of steady development of the powers of the Interstate Commerce Commission, assumed to be granted by Congress under the commerce clause of the Constitution. The proposed amendments, without question, seek to cut the cords which have tied the hands of the Commission in the matter of consolidations, and virtually give the Commission plenary power to authorize consolidations, provided they are initiated by the railroads. This steady enlargement of the powers, jurisdiction and authority of the Commission is receiving the serious thought of many students of public affairs, and it has been suggested with some plausibility that the tendency is destined to culminate in Government ownership. The gradual aggrandizement of the Commission has been at the expense of the railroads. The old time competition is gone. The spirit of initiative, development and enterprise has practically ceased to exist. The railroads have gradually passed more and more under the developing powers of the Commission until they are now largely dependent upon that Commission, which regulates and controls them. What the final outcome will be, no one can foresee, but it is certain that the railroad policy of this country is yet in the making. There are those who assert that either the restriction to railroad initiative and development must be lifted or Government ownership is the inevitable result.

The Act of 1920, as is now well known, was in itself an amendment to the previous acts governing the railroads, and sought to provide a remedy for the complaints urged against the railroads prior to the war.

The basic Act is the Interstate Commerce Act of February 4, 1887.[4] This was the first important act seeking to regulate the railroads. The principal purpose of this act was to cure those abuses which had developed with reference to unreasonable rates and unjust discrimination on the part of the railroads between persons and localities.

This Act did not afford the complete remedy contemplated by its framers. The railroads took advantage of its defects and weaknesses, and, as a result, several important amendments were passed at subsequent Congresses, finally culminating in the amendment of January 18, 1910.[5] In this last act, the powers of the Commission over the roads

1. S. 3840, Calendar No. 582, Report No. 580, April 5, (Calendar day April 13) 1926.
2. 41 Stat. L. 456; 1920 Sup. Fed. Stats. Ann. p. 65.
3. Railroad Commission of Wisconsin et al, vs. Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563, 66 L. Ed. 371.
4. 24 Stat. at L. 379, ch. 104, Comp. Stat. Sec. 8563, 4 Fed. Stat. Anno. 2d Ed., p. 337.
5. 36 Stat. L. 544, 4 Fed. Stats. Ann. (2d Ed.) p. 570.

were substantially increased and it was authorized to deal with the carriers in a much more summary manner.

Notwithstanding the increased powers given to the Commission by Congress, the law yet failed to meet sufficiently the situation facing the country, and the complaints against the railroads and their service and rates still reached the Washington Government in increasing volume. The fact, among others, seemed to be plain that the carrying capacity of the railroads was not developing proportionately with the growth of the country, particularly in the newer portions of the country. This served to retard the development of the country, and was a matter of deep concern to those who had need of adequate railway facilities. It was the consensus of opinion among students of the railway situation that the railroads were not meeting the demands upon them; that their plants were not adequate to the situation and the facilities afforded were not keeping pace with the development of the country.

This was the situation when this country entered the war. The laws theretofore passed had failed to remedy the situation. Hence it became at once apparent to the President and his advisers, that if this country was to do its full part, it would be necessary to immediately increase the facilities of the railroads and make them adequate to the transportation needs of the country. Several plans were considered. At that time, however, the policy of this country was well established by the Sherman Anti-Trust Law and the Clayton Act, and by a long line of judicial decisions under them, that competing railroad corporations could not consolidate if to do so should substantially lessen competition and create a monopoly in Interstate Commerce.[6] These laws seemed to stand in the way of a consolidation of the railroads under private ownership. The result finally reached was that the President was authorized to take over and operate the railroads for the period of the war. The railroads passed under Federal operation from January 1, 1918, until March 1, 1920, when the new Transportation Act went into effect.

After the conclusion of the war, it was plain that the roads must be turned back to their original owners under adequate legislation. Elaborate hearings before the Interstate Commerce Committees of both Houses were held, and as an outgrowth of these hearings, Congress was brought to the conclusion that in turning the roads back to their owners, drastic changes in the prior acts of Congress must be made in the interest of better railroad facilities, reasonable rates between persons and localities, and a fair return to the railroad owners, and that, to that end Congress should, by appropriate legislation, seek to effectively build up a system of railways adequately prepared to handle promptly all the interstate traffic of the country.[7]

The plan finally agreed upon as being the efficient means of bringing about the desired result was a general consolidation of all the railroads of the country into a limited number of competitive systems. Congress felt that if the three thousand-odd railroad corporations could be merged into a few great corporations, and the railroads themselves consolidated into a few strong competitive systems, this would work in the interest of the public good. The premise from which this conclusion was drawn was that a few corporations, rather than many, could manage the transportation business with greater despatch and saving, and a limited number of competitive systems would serve to eliminate waste, reduce overhead, make for economy, and last but not least, force the stronger roads to absorb those weaker roads which were struggling to maintain themselves.

The outcome of the hearings was the Transportation Act of 1920. It was one of the most carefully prepared pieces of legislation which has been placed upon the statute books in decades. It was a composite of the views of many who appeared before the Committees who were qualified to speak, including railroad heads, public officials, railroad experts, political economists and the like. It is only fair to say, however, that many of the larger railroad owners were not satisfied with the compulsory features of the bill. These features, nevertheless, were carefully thought out and were written into the bill after much study, reflection, and deliberation. They formed the central column of the structure to be erected. The bill finally passed and has been in operation now for about five years.

The Act, however, has not met the entire approval of the whole country and it seems to be the center of a growing controversy. Its advocates are still loud in its praises and assert that it will meet the demands of the country and is the sure prevention of Government ownership. There are those, however, who doubt its wisdom and argue that the creation of a few large corporations in control of all of the railroads, while making regulation easier, serve only as an ever-present invitation to the Government to lay hold of them and to make them its own. They also assert that the plan obstructs individual enterprise, retards development, destroys wealth and impedes competition in both service and rates.

It was contemplated by the Act that the consolidations were to be forced by the Government in pursuance of a plan comprehending the entire Continental United States, to be promulgated after hearings, by the Interstate Commerce Commission, Paragraph (4) of the Act provided for the plan and its mode of formation. This plan was to be so framed that it would constitute a unit and the limited number of systems to be created were to co-ordinate. In other words, every consolidation was to be ordered on the basis of its relation to the other parts of the plan and should be in strict harmony with it.

Paragraph (5) of the law provided for a tentative plan as a preliminary to the adoption of the final plan. This tentative plan was to be given to the country for its information and criticism, and to serve as the basis of hearings before the Commission looking to the final plan.

Shortly after the passage of the Act of 1920, the Interstate Commerce Commission employed the services of Prof. William Z. Ripley, a noted economist, to assist the Commission in preparing the tentative plan. Professor Ripley worked for about a year on the plan, and finally submitted his report to the Commission. The Commission made some changes in the plan as recommended, but, in the main, followed his suggestions. The

6. United States vs. Southern Pacific Company, 250 U. S. 228, 68 L. Ed., 915.
7. Dayton-Goose Creek Railway Company vs. United States, 263 U. S. 456; 68 L. Ed. 388.

report of the Commission with the Ripley plan, when printed, covered some 650-odd pages.

A study of the Ripley report shows it to have been carefully worked out and no position was taken without mature deliberation and ample consideration of all the factors. The plan recommended the consolidation of all the railroads of the country into nineteen systems. The tentative plan adopted by the Commission, as stated above, followed these recommendations in the main.

As soon as the Interstate Commerce Commission promulgated its plan, which was in the fall of 1921, it directed copies to be sent to all the railroads and to the Governors of the States, and set to work to have hearings on the tentative plan throughout the country, as provided by the Act under review. These hearings were had in the principal railroad centers of the country and a large amount of testimony was taken. Any one desiring to be heard was given an opportunity by the Commission. All suggestions for and against the tentative plan were heard. Moreover, briefs were received by the Commission from any person interested, and many comprehensive written arguments were submitted by Chambers of Commerce, Commercial Clubs, Traffic Bureaus, Stockmen's Associations, and the like. In fact, some of these briefs were elaborately constructed and covered a wide field; in some instances, going to the fundamental principles of the Act itself. All the record has been very carefully considered by the Commission.

This record, besides the evidence and briefs referred to, contains many maps and tables, and is said to furnish the most complete information ever gathered together respecting the railways of the United States and the service they render. This mass of data is now on file with the Commission where it is intended to be kept for future proceedings under the Law.

When the Commission completed its hearings, however, it discovered that it had a gigantic task imposed upon it in endeavoring to fuse the railways of the country into a limited number of systems. It was found that there were many factors to be taken into consideration. Great cities had sprung out of the desert, as it were, on the strength of railroad competition. These cities, many of them inland cities, had become strategic railroad centers on account of the great transcontinental lines making them the base of their operations. Vested property rights of untold value had been created and developed because of the railroads. Huge investments had been made on the basis of competing lines—investments not only by the railroad corporations themselves but by others who placed reliance in the continuation of the existing order. Other cities on the sea coasts had developed to vast proportions by reason of the fact that they had become the termini of competing lines of transcontinental roads racing across the country to outstrip one another in the business of carrying passengers and freight.

The deeper the Commission dug, the greater appeared the problem. Never before had it become so apparent that the prosperity of the country was dependent upon its railroads. Huge maps laid on the mahogany desks before the Commissioners depicted the railways as great arteries of trade and travel. The United States was the patient—not an old and decrepit person, but a young, vigorous and lusty youngster, growing every day and demanding more and more. The problem to be solved was whether the reduction of the number of arteries would bring to the patient the additional blood supply called for by its daily growth and development, or whether or not these arteries should be left intact except when conditions justified their re-arrangement.

It soon became apparent that to touch any one of the large arteries of trade and commerce was a matter of serious import. The effect would be felt at once, not only in territory adjacent to the lines involved, not only in the cities built by those lines, but the result would reach to every part of the whole country and even the remotest hamlet in the far-away corners would sense the operation.

The Commission, indeed, had been given a task of the gravest responsibility, one affecting the very life-blood of the country. What should it do?

The Commission did what would be expected—it went back to the source of its power, the Congress of the United States, told its difficulties, gave its views, and recommended a substantial modification of the Act.

On February 4, 1925, the Commission addressed the Senate Committee on Interstate Commerce.[8] and stated that a majority of the Commission had doubt of the wisdom of the provisions of the law which required it to adopt a complete plan to which all future consolidations must conform, and "that it had been impelled to the belief that results as good, and perhaps better, are likely to be accomplished with less loss of time if the process of consolidation is permitted to develop, under the guidance of the Commission, in a more normal way." In other words, the Commission has been forced to the conclusion that the compulsory features of the Act of 1920 are unsound, and that the consolidations, if they come at all, should come through normal development.

The question immediately arises in the inquiring mind: What becomes of the proposition that a few corporations and a few competitive systems is the desideratum, and what of the postulate that the stronger roads must be compelled to take over, willy nilly, the weak lines?

That the Commission itself gave profound consideration to these important questions of policy is apparent from a study of its reports and decisions. In fact, in order to obviate the criticism that will inevitably arise from those quarters interested in the protection of the weak roads and the territories now served by them, the Commission recommended that an amendment to the Act of 1920 be framed, authorizing the Commission to disapprove a consolidation which did not include a carrier which it ought to include. In a word, the Commission conceded that the merger of weak with strong lines was one of the compelling reasons which Congress acted upon in passing the Act of 1920, and asserted that the amendment proposed would achieve the desired end. But will it?

Students of the situation argue with much force that the amendment, as a practical matter, will not meet the situation now existing among the weak roads needing immediate assistance, and that the proposed change entirely removes the authority

8. See 39th Annual Report of the Interstate Commerce Commission under date of December 1st, 1925, p. 12.

of the Commission affirmatively to compel the absorption of the weak lines.

It is clear that the amendment recommended is negative in effect, in that, under its terms, the Commission cannot affirmatively compel, except in an indirect and roundabout manner, the consolidation of strong and weak lines. The only remedy afforded is to refuse to approve a merger except upon the condition that a weak road will be taken over. Doubtless, therefore, the result will be that in any given case where stronger roads, for reasons of their own, do not care to burden themselves with a struggling line, they will not seek a consolidation unless they are assured of an approval of their plan.

Moreover, the amendments suggested by the Commission wholly lose sight of the pivotal motive upon which the Act of 1920 turns, that is to say, the need for affirmative action on the part of the Commission to build up within a relatively short period of time a system of railways adequately prepared to meet the growing demands of the country.[9]

The new amendments, without question, construct a new premise upon which the policy of the country is to be built. Whereas, in 1920, the President and Congress were of the opinion that the railway situation called for prompt, affirmative and drastic action on the part of the Government to weld within a comparatively short period of time the railways into a complete whole, with all parts co-ordinated, now, they are about to reach a different conclusion. The present view seems to be that the railroads should be fused, if at all, in the process of economic development and then only upon the application of the railroads interested. Whether this change in policy will, in the long run, meet the demands of the country is, of course, at present problematical. Only time and experience can tell.

On December 21, 1925, Mr. Cummins, Senator from Iowa, Chairman of the Senate Committee on Interstate Commerce, introduced a bill including the amendments suggested. The bill was numbered S. 1870. Hearings were ordered upon it and they were held in January and February of this year. A good deal of testimony was received, including illuminating statements from Interstate Commerce Commissioners Joseph B. Eastman and Henry C. Hall, in support of the amendments.

The statement of Commissioner Eastman deserves the attention of those interested in the development of the economic and industrial life of the country. His statement is both frank and straightforward, and paints in vivid colors, the shift of sentiment, opinion and policy in this country touching railway consolidations. He said in part:[10]

> We are strongly inclined to believe that it is wise to place greater reliance upon the processes of gradual evolution, learning from experience as we go along and making practical use of the results of this education. I do not mean, of course, a process of evolution under the sway only of the law of the survival of the fittest, but a process of evolution carried on in the spotlight of publicity and under the guidance of the best thought of the country so far as we have the benefit of that thought and are able to translate it into action.
>
> This brings me to a further consideration that has influenced our view. Not so very long ago the dominating opinion in this country was that mergers, consolidations, or unifications of railroad properties, whatever they might be called, were hostile to the public interest and ought to be restrained by law in order that competition might reign supreme. The thought is embodied in any number of Federal and State statutes. Sometimes in State constitutions. The pendulum has now swung to the other extreme, and it seems to be the dominant opinion of the country, at least in many important and influential quarters, that our transportation salvation lies in the way of widespread, radical and almost revolutionary consolidations of railway properties.
>
> In 1920, the Commission was of the view that the former opinion of the country was unfounded in many respects and that the door should be opened to many consolidations or unifications, which were then made impossible by restraining State or Federal laws.
>
> We so recommended to Congress and submitted a draft of legislation which would accomplish this purpose and which was similar in many respects to the bill whch we now submit. We went no further then, however, than to express the opinion that the door should be opened, and we did not undertake to stand sponsor for the thought that the consolidation of the railway properties within a relatively short period of time, into a comparatively small number of great systems would produce results that are clearly desirable in the public interest. *In our opinion this fact has yet to be demonstrated* (italics ours). Nor do we believe that it can be demonstrated except as the result of actual experience. We have an impression that there has been a tendency to exaggerate the possible economies and other advantages of great consolidations, and we have been strengthened in this impression by the evidence which has been brought to our attention in connection with the unifications which we have been asked since 1920 to approve. We think that the country ought not to be led into the belief that great consolidations of railroad properties involve any probability that the general level of freight rates may thereby be substantially reduced. Economy and efficiency of operation are much more than a matter of size. There are small railroad companies which are as economically and efficiently operated as any of the great railroad systems. It still remains a question how far a single management can with advantage be extended over railway lines.

Space forbids further extracts from his startling testimony. In reading his evidence, however, one cannot avoid the thought that the Commission has been profoundly shaken in its faith as a result of its experience thus far under the 1920 Act, and that today it desires to side-step credit for the authorship of the Transportation Act of 1920. It is very clear, too, that it is at sea in its present views, and has grave doubts as to the efficacy of a policy of large consolidations and unifications.

The result is a new measure known as S. 3840. This is the Interstate Commerce Commission bill, with amendments proposed by the Senate Committee on Interstate Commerce. This bill was reported to the Senate on April 5th of this year with the recommendation that it pass. The bill was not pressed for action at the session of Congress just concluded, but, unquestionably, it will be given consideration at the December Session. In the meantime, it is rational to suppose that few, if any, "unifications" will be approved by the Interstate Commerce Commission until Congress shall have acted upon the proposed measure. The fact of the rejection of the Nickel Plate merger, coupled with the impending changes in the law, has left the railway situation very much unsettled. Until a definite policy has been agreed upon at Washington the Commission will undoubtedly mark time.

9. Dayton-Goose Creek Railway Company v. United States, supra.
10. See his testimony of January 22, 1926, Part 1, Hearing on S. 1870, pp. 48 and 49.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

CURING the Criminal, by Jesse O. Stutsman, New York: Macmillan & Company, 1926, Pp. VIII, 419. $2.50; *The Repression of Crime*, by Harry Elmer Barnes, New York: George H. Doran Company, 1926, Pp. VI, 382. $2.50; *The Riddle of Society*, by Charles Platt, New York: E. P. Dutton & Company, 1926, Pp. IX, 306. $2.00.—These works dealing with crime and the criminal approach the problems involved from widely different viewpoints and yet they contain much in common. First as to the authors. Mr. Jesse O. Stutsman is the general superintendent of Rockview Penitentiary, Bellefonte, Pennsylvania. He presents in his work the "active experience of eighteen years in research and correctional work" in contact with approximately 50,000 convicts. He gives an intimate and first hand impression of the prisoner and problems relative to prison government.

Doctor Harry Elmer Barnes is professor of Historical Sociology at Smith College. He was a member of the New Jersey Prison Inquiry Commission in 1917. His method of approach is primarily historical, showing the trend of prison reforms beginning with the barbarisms of earlier times to the more humane and scientific and yet inadequate methods of today.

Doctor Charles Platt is a physician. He was director of the Pennsylvania Commission on Penal Affairs. His work is speculative and philosophical.

In two important features the three works are in entire accord, viz., in expressing the inadequacy of the legalistic treatment of criminals and in urging the great need for experts, particularly for psychologists and psychiatrists in the scheme of crime repression. What chance, asks Dr. Platt, "has scientific reservation in the hands of a play-acting cross-examiner?" He continues:

> The jury should have no say as to the mental condition of a prisoner. . . . The court should be a dispensary, with a staff of jurists, doctors, and psychiatrists whose duty it would be to make social diagnosis and prognoses of those who were brought before them. (Pp. 164-165.)

Superintendent Stutsman, though approaching the subject through his experiences from a different viewpoint, expresses like views. He constantly urges the services of the expert in dealing with the criminal. He says:

> A skilled psychiatrist is of such tremendous assistance to every department that I do not understand how we have ever done without him. . . . His analysis should be the determining factor in disciplinary measures, mental treatment, vocational guidance, segregation and determination of sentence. (P. 66.) . . . The modern theory of criminology is that all anti-social personalities should be sifted out of society for correction; or, in case correction is impossible, for permanent segregation. . . . The fundamental weakness of our present jurisprudence is that the law classifies the criminal as a robber, a thief, a yeggman, a murderer, a rapist, or vagrant according to the crime he has committed and assesses his punishment according to the degree of his offense rather than with any regard to his actual needs for his restoration and readjustment. (p. 310.)

Dr. Barnes is even more emphatic in the expression of his views. The criminal, he believes, in nearly every case "is defective in one way or another." And it is "necessary to take positive remedial action with the aim either of eliminating his defects or rendering these defects no longer a danger to society." For the future he forecasts that the scientific procedure "will be to bring every person convicted of crime before a competent and permanent examining body made up of physicians, psychiatrists and psychologists, who will be able to study and differentiate the convicts and prescribe the desirable methods of treatment indicated by the specific defects of the individual convicts." Under this system "a certain number of convicts will be revealed at once upon examination to be of a type that should never, under any circumstance, be again restored to a life of freedom, but should be permanently segregated or painlessly exterminated." (p. 31.) The new criminology he emphasizes "will delegate the study and treatment of the criminal to a permanent group of experts under the leadership of trained and enlightened psychiatrists." (p. 323.)

Superintendent Stutsman sees a great improvement in the prison administration of our time. Although there is even now a profound lack of understanding of the delicate problems relating to prison government, we are witnessing the dawning of a new science and a new profession. The great handicap to progress in prison reform in the past he thinks can be expressed in one word—"politics." It has been a shortsighted and vicious practice which has placed the welfare of the prison in the hands of a political appointee. We are just beginning to see the necessity for trained men and women whose first interest is to gain an intimate and intelligent understanding of the prisoner and prison conditions. Mr. Stutsman has humane views on the matter of maintaining discipline among prisoners. It is his belief that the "future prison is destined to become an educational institution with systematic equipment to furnish its inmates of all classes with every possible facility for intellectual, physical, industrial and moral culture." (p. 167.)

An interesting chapter in the work deals with prison architecture. "An obstacle, almost insur-

mountable, to the modern warden is the lack of appropriate tools with which to work." The prison structures handed down to us from the "more retaliative era of penology . . . are antiquated and worn out." (p. 81.) In contrast, the "crime therapist of today proceeds upon the hypothesis that imprisonment should partake of the nature of hospitalization for the purpose of restoring the criminal to normal physical, psychical, and moral health." (p. 83.)

The chief merit of Dr. Barnes' work is in its historical material. It is particularly instructive on the Colonial period. He has found that the Quakers of early colonial times had adopted a system of dealing with the criminal far in advance of their time. In the code of 1682 they eliminated religious offenses and substituted imprisonment for the death penalty in all crimes except murder and "for the other more barbarous types of corporal punishment." This code "marks the first instance in the history of criminal jurisprudence in which imprisonment at hard labor was prescribed as a punishment for a majority of the acts which were branded as crimes by the community." (p. 52.)

In the early history of our country two schemes of prison administration—the Pennsylvania and the Auburn—divided the criminologists and penologists of the time into two hostile camps. The Pennsylvania Quakers were the pioneers. After substituting imprisonment for corporal punishment, they initiated a scheme that imprisonment should not be idle but at hard labor. Later they "added the principle that imprisonment at hard labor should be in cellular separation, and thus created a modern prison system in its entirety." (p. 86.)

The New York pioneers, after studying the achievements of the Quakers, and after several experimental efforts of their own, finally evolved the famous Auburn system "of congregate work by day and separation by night, with enforced silence at all times." (p. 109.) New York later also evolved the Elmira system.

It is more difficult to classify Dr. Platt's work. He has chapters on environment, the rich and the poor, puberty, the thief, and the prostitute. He has interesting remarks to offer concerning reforms and reformers, and in one chapter undertakes a criticism of the law. This is perhaps the least worth-while of his offering. It is difficult to resist the conclusion that it is filled with platitudes, gossip and half-truths.

A valuable and thought-producing chapter is that under the heading "the non-social." Here he holds up a mirror to us. We of the immaculate law-abiding class are, after all, not far removed from the criminal. "All that separates us from those we call criminals is that with us it is the larger social influences which have predominated—we are with the majority, and they with the minority. But no matter how you may look at it, the difference will be found trivial." (p. 39.)

The reading with an open mind of these books cannot fail to raise the conviction that the legalistic view of crime, taken by itself, is inadequate. Science should and must be given a prominent place. Perhaps our authors have made the mistake, due to an imperfect understanding of the function of the law, in assigning an insignificant place to the law in their schemes of crime repression; but be that so, the lawyer has been guilty of as great an error in not giving a place to the scientist. The scientist is interested in the problem of crime and is in a position to offer valuable assistance. It will, in fact, mark the dawning of a new day when the various agencies interested coordinate their efforts.

University of Illinois. ALBERT J. HARNO.

Women Police, a Study of the Development and Status of the Women Police Movement, by Chloe Owings. New York: Hitchcock, 1925. Pp. xxii, 337. $2.50.—In this study, which is one of the publications of the New York "Bureau of Social Hygiene," Dr. Owings has assembled some very interesting material on the history of women police, including police matrons and so-called "patrols." Many readers, however, will be disappointed to find the book somewhat overweighted on the historical side. Three chapters, including a lengthy one dealing with London, are devoted to the development of the work in the United Kingdom and the British Dominions, two others to continental Europe and other parts of the world, and another chapter deals with the history of the International Association of Police-women. Eight chapters are devoted to the United States, but two of these are also historical, tracing the early beginnings of the movement and its connection with the war time Committees on Protective Work for Girls and the Interdepartmental Social Hygiene Board.

This historical material undoubtedly has its place in the literature of the movement, and it is convenient to have it assembled in one place; nevertheless the majority of readers and students are primarily interested in the present scope and importance of the work, and the character of the services that are actually being rendered by so-called "police-women." Moreover, there is a great deal of repetition in these historical chapters, and too much space is given to relatively unimportant details connected with the early attempts at organization. The meetings of club women and other groups were addressed in one city after another by the same speakers, and the steps taken were so much the same that the detailed account for each city with names of organizations and names of the same speakers repeated and other similar details seem hardly worth the space that is given to them.

Probably 145 American cities employ women police at the present time, but the work is largely unstandardized and appears at times to have little in common except a name. It is interesting that Germany seems to have been the first country in the world to establish the office of "policewoman," and 35 different German cities are said to have had women police officers before the war. In America, Portland apparently led the way in 1905. At least we are told (p. 166) that Portland was the first city in the United States to organize a women's division in its police department. But we are also told (p. 102) that Los Angeles appointed "the first regularly rated 'policewoman' in this country."

The chapters of most interest are the three dealing with the "Program of Work," "Community Problems and the Police," and "Form of Organization" (chapters XI, XII, and XIII). Unfortunately

these chapters are brief and together occupy less than 70 pages of the book.

A good deal of space has been sacrificed to the footnotes, which contain much unnecessary material. Many of these notes are too detailed, giving such items as names of publishers and, in some cases, their addresses and the prices of the books. These facts might have been included in the bibliography given at the end of the book. The bibliography might also have covered the addresses of such organizations as the American Social Hygiene Association or the National Council for Combating Venereal Disease, which might have been given once instead of being repeated in one footnote after another. In reference to British Government publications it is also wasteful to repeat again and again the street address of H. M. Stationery Office. In the same way it is annoying to have so many footnotes containing the names of the author's informants and correspondents since again this leads to a rather tedious repetition of a relatively few names.

Many of these criticisms may seem trivial, but the book is good enough and the subject important enough to justify the time that would have been necessary for a more careful revision before publication.

This volume will be useful as a general compendium, and the historical material will remain of permanent value; but another volume is greatly needed to discuss in greater detail typical case problems and policies which are of interest to all engaged in protective work for girls whether they are called police women or are representatives of private agencies.

EDITH ABBOTT.

School of Social Service Administration, University of Chicago.

A History of English Law, by W. S. Holdsworth, K. C., D. C. L., Vinerian Professor of English Law in the University of Oxford, Fellow of All Souls College, Oxford. Vol. 7. Pp. xxxii, 575. Little, Brown, & Co., 1926.

That Professor Holdsworth is coming to the United States next year gives a fresh interest to his History. Taking up our review where we left off, we may begin by saying that the seventh volume has to do principally with the land law, between 1485 and 1700. And first of *seisin*.

Of the man in possession it must at least be admitted that he is there. As between him and the true owner the law was long in doubt. For centuries the important thing was to be seised,—Maitland wrote of the "Beatitude of Seisin,"—"Blessed are the seised." This meant that if I am the rightful owner of land, in actual possession, and you can succeed in getting into possession (we may almost say by hook or crook,) you at once have me at a tremendous disadvantage. For most purposes the law will recognize you as owner, while all that the law leaves to me is a decidedly cumbrous right of action. The simpler actions are not open to me; I cannot, for example, bring an action of trespass. But, worst of all, I cannot deal with the land, for the law sternly discountenances any attempt by one out of possession to convey land.

The lever that at last moved the dead weight of seisin was a curiously characteristic bit of common-law machinery. They were as familiar in the middle ages are we are with the idea that if the man on the spot is my tenant, I am nevertheless in possession, through him; and there were other instances of what might now be called *constructive* possession, as distinct from physical occupancy of the land. This gave a clue. A person goes into occupation of my land under circumstances that would ordinarily constitute a disseisin; I choose, however, not to regard him as a disseisor, but as holding under me. Thus I am left with all of the many convenient remedies available to one in possession. This is the doctrine of *disseisin at election;* that is, I may elect whether or not I shall consider myself disseised. Lord Mansfield exclaimed as late as 1757, "if it was not for this doctrine of election, what a condition would men be in!"

Another of the "modifications of the law designed to improve the position of the disseised owner" may be mentioned. Seisin was created and transferred by the Statute of Uses in certain cases; clearly this particular "seisin" was more like "a right to get possession." Seisin under the Statute "has lost its necessary connection with physical control, and become in substance a right." Thus seisin will tend to be connected with title, and to be separated from physical possession, and it is in this form that we moderns know it.

From phases of the new treatment of disseisin the doctrine of *adverse possession* grew up.

Contingent remainders are next discussed, very fully. The courts of law for a long time refused to admit their validity at all, greatly fearing the landowners' attempts to create arrangements under which land might be made inalienable for too long periods of time.

He would be a bold reviewer who should attempt to state briefly the substance of the next section, which has to do with *executory interests*,—including shifting and springing uses, executory devises, and purely equitable estates. This may sound only moderately inspiring, yet we have found an eagle's feather in this section, which gives the grateful reader of Holdsworth's History at least a slight thrill. Of these last-mentioned executory interests (the ones created by equity) the author says, apparently in an unguarded moment: "I shall have more to say of the evolution of their incidents when, in the next Book of this History, I deal with the evolution of the principles of equity." But no "next Book of this History" is announced; the present Book (not volume) is the last we have heard of. We are reminded of the famous pictorial paper-jacket on the first instalment of Dickens' unfinished novel, *The Mystery of Edwin Drood*, which contains strange and awesome things that are not in the book as far as the author wrote it.

The development of *powers of appointment* helped mitigate the worst evil of the system of strict settlement of land,—"the continued occupation of the land by persons with very limited rights of disposition and of user." Modern acts of Parliament have made a great advance here, "by taking into consideration, not only the needs of those taking interests under settlements, but also the needs of the actual tenants [in the widest sense] of the land, and of the public at large."

To check further these vast designs of the landowners the courts invoked the *Rule against Perpetuities*. In the country of Professor Gray, to whom Holdsworth gives his usual full and generous acknowledgment, it will be unnecessary to say more than that there is an old Rule against Perpetuities, as to which Sweet is the principal English authority, and a modern Rule, with the same name,—the two have sometimes been confused; and that Sweet and Gray,—two noble antagon-

ists,—contended valiantly on certain points, the battle-ground shifting from England (the *Law Quarterly Review*) to America (the *Yale Law Journal*).

We may be allowed to give at this stage a little taste of the book itself that we are reviewing:

> I have now dealt with the powers of the landowner to regulate the devolution of his property, and the conditions under which he can exercise them. The law regulating this matter has been for the most part evolved by the needs and desires of the owners of great estates. The evolution of its principles has been connected to some extent with great principles of public policy; but, to a much larger extent, with the resolution of fine and often speculative problems of legal theory, which the desires of these landowners have set to the conveyancers and the courts. These landowners have in fact endowed the research needed to construct this body of legal theory; and thus, in this as in the mediaeval period, it may be said that much of our modern land law is law made in the first instance to meet the needs of the great landowners. Naturally this body of law, being concerned with nice points of legal theory, is very remotely connected with the land itself—it is of the study, academic, rather than of the earth, earthy. But we must now descend from these heights, come nearer to the land itself, and say something of the evolution of the law which regulates the rights and duties of the persons who actually occupy it.

Thus does the author felicitously pass over to the law of *landlord and tenant*. In this section we may note the discussion of the mediaeval theory of rent as a thing issuing out of the land, and "very much like an estate in the land," and the modern theory of rent as simply a payment due under the contract with the landlord. It is upon the former theory that distress for rent is based, while the doctrine that a lessee cannot get rid of his obligations by assigning his estate, belongs under the latter; "though privity of estate ceased, privity of contract remained." On page 273, note 7, there is an interesting precedent of a moratorium for tenants in war-time (A. D. 1336).

The next section is on *Copyhold*. In 1584 Coke said that "great part of the land within the realm is grant by copy." This form of land-tenure, after lasting from immemorial antiquity, was abolished only within the present year, by the new Property Acts which went into effect on January 1, 1926. The thousand years of the history of tenure by copy of the court-roll of the lord of the manor hide a sad series of injustices to the poor.

Incorporeal Things come next, and principally thereunder Easements. "Both the term 'easement,' and the thing itself, were known to the mediaeval common law," but "it is significant that Blackstone does not describe easements in general, and that the only easements which he mentions in his list of incorporeal things are various rights of way." The law of easements is now pretty well understood; as that there can be no such thing as an easement in gross; a true easement is "a right of property attached to a dominant tenement"; which distinguishes it from "a customary right in the nature of an easement," and also from "a merely personal license to use." This was not always clear.

The law of *prescription* belongs in legal history at this point. Holdsworth says that "there is no branch of English law which is in a more unsatisfactory state":

> There are, indeed, other branches of English law which stand in need of an intelligent restatement; but no mere restatement can clear up the muddle which the courts and the Legislature have combined to make of the law of prescription. What is required is a total repeal of the existing common and statute law, and the substitution of an entirely new set of rules, based upon an understanding of the meaning of the doctrine of prescription, and of the results at which it should aim.

The history of *Conveyancing* comes next, a story of absorbing interest. In time, "the practice of conveyancers . . . tended to be treated by the courts as such cogent evidence of the law, that it can be regarded almost as a secondary source of law."

In the accompanying, and even more interesting, section on *Interpretation of Conveyances*, we may note that the valuable essay of F. Vaughan Hawkins, on *Principles of Legal Interpretation*, here twice cited in foot-notes, from the second volume of the Juridical Society Papers, is more readily available for American readers in another form, having been printed by Thayer as an appendix to his *Preliminary Treatise on Evidence at the Common Law*.

The remaining chapter of this volume (one hundred and fifty pages) is devoted to *Chattels Personal*. It includes a full discussion of trover and conversion, of the development of doctrines as to the ownership and possession of chattels, of rules as to their acquisition and loss, and lastly (thirty pages) of choses in action.

But the printer's devil is at the door, and the last-mentioned chapter must be left without comment; and the eighth volume of Holdsworth for another day.

CHARLES P. MEGAN.

Chicago, November 3, 1926.

In *Cases on the Law of the Constitution* by B. A. Bicknell (Oxford University Press, American Branch. Pp. 215. $2.50) are gathered the leading English cases dealing with the powers of Parliament and the Crown, the rights and duties of individuals, and the interrelations of the various component parts of the Empire. In general only the gist of the facts and of the opinion is given.

Putting Laws Over Wings by W. Jefferson Davis, Lieut.-Colonel O. R. C., 1926. Pp. 96 and an appendix pp. 12. This recent booklet, dealing with an extremely interesting subject now in its infancy but destined to be vastly important in the near future, is throughout an extended argument in favor of what has already come to pass, i. e. federal legislation regulating aviation. Hardly was the ink dry on the pages of the book when the Air Commerce Act of 1926 was passed, by which Congress has undertaken completely to regulate transportation by aircraft among the several States and with foreign nations. Colonel Davis' book cannot be described in any sense as a textbook on the law of aviation for, as he himself says, this "new activity in an unused and unexplored element, finds itself in America without law or precedent." He combats strongly, however, the supposed principle of the common law expressed in the oft quoted sentence, *Cujus est solum, ejus est usuque ad coelum et ad inferos*, and says: "I have never given serious consideration to the worn out fallacy that the individual property owner owns the land from the center of the earth to the sky." It is to be noted that the Air Commerce Act does not attempt to settle to what extent the above quoted maxim is law, and hence the question is left open for judicial determination in the future. As a pioneer on a new frontier of human knowledge and achievement, this little book should challenge the attention of the members of the legal profession. There is a short introduction by General Pershing, wherein he stresses the necessity of developing commercial aviation and of securing favorable Federal legislation as a basis for our national defense by way of preparedness in the air.

J. NELSON FRIERSON.

Columbia, South Carolina.

THE UNIFORM FIREARMS ACT

Recent Development of Firearms Legislation and History of Act——Proposed Measure Preserves Fundamental Provisions of Revolver Association Act—License to Carry As Against License to Purchase or Possess—Summary of Provisions

CHARLES V. IMLAY
Chairman, Committee on Uniform Firearms Act, Conference of Commissioners on Uniform State Laws

UNDER the head of "Current Legislation" in the September, 1925, number of this Journal,[1] Mr. Joseph P. Chamberlain reviewed under the title of "Legislatures and the Pistol Problem" a number of recent state statutes enacted to regulate the sale and possession of pistols and revolvers, the general trend of these enactments and their relation to prevailing laws in the various states. At the time Mr. Chamberlain's article was printed, the subject of firearms legislation had just been presented in an exhaustive report to the National Conference of Commissioners on Uniform State Laws by a committee of that body at its sessions in Detroit, August 25-31, 1925, and a first tentative draft of a proposed "Uniform Act to Regulate the Sale and Possession of Firearms" had been discussed in full by the Conference.[2] The proposed act was recommitted by the Conference to its committee and was brought again before the Conference at its sessions in Denver, July 6-12, 1926, in the form of a second tentative draft. As a result, the Conference, after another full discussion, has approved and recommended for adoption by the states, the completed Uniform Firearms Act, which received the approval of the American Bar Association along with other acts presented to the Association at the same place on July 15th by the Standing Committee on Uniform State Laws.

When the subject matter of the Act was first brought to the attention of the National Conference at its meeting at Minneapolis in August, 1923, a movement in the direction of uniform firearms legislation inaugurated by the United States Revolver Association was well under way. That Association, a non-commercial organization of amateur experts in the use of revolvers, had through its legislative committee drafted a proposed uniform law, which had already been enacted in whole or in part in a number of states. The California Act of 1923[3] which had just been passed follows the Revolver Association Act very closely. North Dakota[4] had adopted it on March 7, 1923, practically verbatim. New Hampshire had on May 4, 1923,[5] adopted it with some changes.

Because then of the favor already shown the Revolver Association Act, as well as its intrinsic merits for clearness and simplicity, that law was made the model for discussion by the Conference. Although the draft finally approved by the Conference shows some variations from the model law in the way of additions or omissions and in changes in phraseology, the fundamental principles of the model law have been preserved. And the decision of the committee of the Conference in selecting this model law has received further support in statutes passed since the matter of firearms legislation came before the Conference. The Indiana Act of 1925[6] is almost a verbatim adoption of the Revolver Association Law. And a number of the sections of the latter law are incorporated, without changes, into the Michigan Law of 1925:[7] some others being incorporated with changes. Recent acts in Connecticut,[8] New Jersey,[9] and Oregon,[10] contain more or less verbatim parts of the model law.

Need for Uniformity

That there is need of more careful regulation of the use of firearms and in particular small firearms (the subject matter of the Uniform Act) is evident from the daily newspaper records of crimes of violence committed with the revolver. The same records attest the desirability of adopting no system of regulation which would prevent the law-abiding citizen from possessing firearms for the defense of his person and property. And the same exigencies which demand the regulation of the sale and use of firearms require that the laws upon the subject be uniform: for no matter how rigid the law of one state may be upon the subject, if the law of a neighboring state be lax, it is easy for the criminal to obtain his weapon in the latter and carry it into the former.

Schemes of regulation have heretofore ranged all the way from the proposal made in the French legislature some months ago that all persons be permitted to arm *ad libitum* to be prepared for the miscreant, to the suggestion made by one of the members of the Conference in the discussion in Detroit, that no one other than a peace officer under any circumstances be permitted to carry a revolver.[11] Nor has there been any serious effort made to regulate the subject by regulating the manufacture of weapons. The nearest approach to this method was the so-called "Shields Bill" introduced in the Senate, April 25, 1921,[12] which was designed to prohibit the transportation in interstate commerce of firearms other than those of army and navy makes. The bill failed of passage. (A more

1. American Bar Association Journal, Vol. XI, p. 596.
2. Handbook Nat. Conf. Commissioners on Uniform State Laws, 1925, pp. 294, 316, 859.
3. Cal. Laws 1923, Ch. 339.
4. N. D. Laws, 1923, Ch. 266.
5. N. H. Laws 1923, ——.
6. Ind. Laws 1925, Ch. 207.
7. Mich. Public Acts 1925—No. 313.
8. Conn. Laws 1923, Ch. 252.
9. N. J. Laws 1924, Ch. 137.
10. Ore. Laws 1925, Ch. 339.
11. Handbook Nat. Conf. Commissioners on Uniform State Laws, 1925, p. 321.
12. S. 1184, 67th Cong.—1st Sess.

recent bill,[13] in the United States House of Representatives, along the same lines, also failed of passage). And no success has attended various other efforts to control the sale of firearms through Congressional legislation.

License to Carry—Not License to Purchase

In adopting the principle of the Revolver Association Act of a license to carry a concealed pistol as against the requirement of a license to purchase or possess, the Uniform Act follows the almost universal system of regulation which has prevailed in the various states, and which has recently been affirmed in the adoption of the act named in North Dakota, New Hampshire, California and Indiana.

New York has long stood virtually alone in favoring the form of regulation by license to purchase under the so-called Sullivan Law, first enacted in 1888 and now existing there with certain amendments.[14] Massachusetts has recently enacted a law along this line.[15] And a recent West Virginia Law seems to approach the principle.[16] Recently there have been a few states which have attempted to go the whole length and require a state-wide registration or a license to possess. In the first group is the Arkansas Law of 1923,[17] which provided for a state-wide registration of pistols already owned and a license and registration of those afterwards acquired. This law was found so impracticable in enforcement that it was later repealed.[18] The Michigan Law of 1925, mentioned above, likewise requires a state-wide registration of all arms possessed, but it does not go the length of the Arkansas Law in imposing the requirement of a license to possess. The registration feature had upon last information not yet been put into effect, because of technical difficulties.

Another attempt to regulate is a law like that of North Carolina of 1923[19] making it unlawful for any person to receive from any postal employee or express or railroad agent within the state, any pistol without having and exhibiting a pistol permit. The latter law Mr. Chamberlain states to be of doubtful constitutionality.[20]

Much has been said of late in the public press in favor of the license to purchase or possess like that of New York. It has been advocated strongly by prosecutors and others engaged in suppressing crime as the surest means of preventing a pistol from getting into the hands of the criminal. But the Conference has inclined to the view of a license to carry, heretofore almost universal and reaffirmed in the recent enactments named.

It is doubtful whether or not a license to purchase or possess could ever be enforced. Legislation to that end would no doubt be followed by an era of pistol bootlegging similar to the liquor bootlegging which followed Prohibition. The criminal records in New York amply demonstrate that the Sullivan Law has not kept weapons out of the hands of criminals. One of the best safeguards against crime is the consciousness on the part of the criminal that the householder possesses arms. A regulation which would make it difficult for a law-abiding citizen to possess arms would make for lawlessness. The requirement of a license to purchase might render it impossible for a citizen to obtain a pistol when he might need it the most: the requirement of a license to possess would forbid his borrowing a pistol from a neighbor at the moment of a pressing emergency. He would be unarmed as against a criminal armed in defiance of law.

Summary of Provisions of Uniform Act

The Act defines a "pistol or revolver" as a firearm with barrel less than twelve inches in length.[21] It includes in the definition of a "crime of violence" such crimes as are usually committed with the aid of a revolver.[22] When such a crime is committed by one armed with such weapon, a penalty in addition to that for the substantive offense is prescribed.[23] The fact that a criminal is armed with such weapon is *prima facie* evidence of his intention to commit the crime charged.[24]

One convicted in a state of a crime of violence is absolutely forbidden to own or possess a pistol or revolver.[25] The Act forbids the carrying of concealed weapons according to the universal principle in state legislation adopting the modern theory of making the prohibition extend, not only to weapons concealed on the person, but also to vehicles. This is intended to remove the easy method by which a criminal, on being pursued, may transfer a weapon from his pocket to a concealed place in a vehicle.[26] All classes of persons usually excepted by state statutes from the above provisions are excepted by the terms of the Act, and also exceptions are permitted under certain circumstances, for example, carrying a weapon in a dwelling house or place of business.[27]

The Act provides for the issuance of licenses for the carrying of concealed weapons upon a satisfactory showing being made by the applicant as to his character and the necessity for his application.[28] Delivery of firearms to minors under eighteen is forbidden; the age of eighteen being deemed more desirable than the younger age named in a number of statutes and the higher age named in some.[29]

The transfer of a firearm is forbidden to any one who the transferrer may have reasonable cause to believe has been convicted of a crime of violence. A seller may not transfer a weapon on the day of purchase. The Act specifies the means of identifying the purchaser and the preservation of this identification.[30] These provisions, however, do not forbid the lending of a weapon by one citizen to another in case of an emergency.

The Act requires a license of dealers.[31] The giving of this license to the dealer and its retention by him is upon careful conditions, for the breach of which such license will be forfeited.[32] False information in purchasing a firearm or in applying for a license to carry the same is forbidden.[33] The changing of identifying marks on weapons is also forbidden and this prohibition is

13. H. R. 4002, 69th Cong., 1st Sess.
14. N. Y. Consolidated Laws of 1897, ss. 1-14.
15. Mass. Gen. L., Chap. 395, Act. of May 29, 1926.
16. Act April 22, 1925; Laws 1925, Ch. 96, Amending s. 7, Ch. 148, Code W. Va.
17. Ark. Acts 1923, Ch. 430.
18. Ark. Acts 1925, p. 1047, Act No. 351.
19. N. C. Laws, 1923, Ch. 106.
20. Am. Bar Assn. Journal, vol. XI, p. 589.
21. S. 1 Uniform Firearms Act.
22. *Ibid.*
23. S. 2.
24. S. 3.
25. S. 4.
26. S. 5.
27. S. 6.
28. S. 7.
29. S. 8.
30. S. 9.
31. S. 10.
32. S. 11.
33. S. 12.

fortified by another provision that possession of firearms from which such identifying marks have been obliterated shall be *prima facie* evidence that the possessor has changed the same.[34]

The Act revokes all existing licenses.[35] It exempts antique weapons that are merely curiosities.[36] By a specific provision it supersedes all local ordinances.[37]

A special section provides for penalties for violations of the various provisions of the Act.[38] The amounts of fines and lengths of imprisonment are left blank so that these may be fixed in accordance with the needs and usages of the particular state, having regard to the differences in definitions of misdemeanors and felonies obtaining in the various states. The Act conforms to what is believed to be the sound view of putting the matter of punishment in the discretion of the court.

The Act concludes with the usual provision found in Uniform State Laws, viz., a provision that if any part of the Act is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of the Act,[39] the definition of a short title, "Uniform Firearms Act,"[40] the naming of an effective date,[41] and the specific repeal of inconsistent laws.[42]

It is believed that the provisions of the Uniform Firearms Act present no constitutional objections, constitute no drastic changes in the law of any jurisdiction, and if adopted generally will not only secure uniformity, but will remove the evils of the present lack of uniformity.

34. S. 13.
35. S. 14.
36. S. 15.
37. S. 16.
38. S. 17.
39. S. 18.
40. S. 19.
41. S. 20.
42. S. 21.

DEPARTMENT OF CURRENT LEGISLATION

Current Federal Legislation (Continued)

BY J. P. CHAMBERLAIN AND MIDDLETON BEAMAN

THE Prohibition Amendment did not relegate to the Congressional waste-paper basket, all the experience gained in the long series of federal statutes under the commerce power to aid the states in enforcing their liquor laws.

The Plant Quarantine Act authorizes the Secretary of Agriculture to quarantine any State against plant diseases and when such quarantine is established shipment of plants into the quarantined State is unlawful under a criminal penalty. Public Resolution 14 provides that until the Secretary has established a quarantine, the act shall not be construed to prevent any state from enforcing its quarantine laws preventing transport of plants into or through the state from any other state in which the transit state finds that a plant disease exists. This statutory interpretation of the earlier law permits the states to act independently of the Government until the Government has acted.* The direct application of the principle of the old laws regulating liquor is in another provision which declares that when a quarantine has been established by the Secretary, plants shipped in violation of the quarantine are subject to the laws of the states into which they are brought "to the same extent and in the same manner as though" the plants "had been produced in such state . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." This is a further illustration of the divesting by Congress of its power over interstate commerce, in respect to a particular article, a procedure sanctioned when applied to intoxicating liquor.[1] The question arises as to whether a violator of the Federal quarantine will be subject to penalty under the Federal law in the Federal courts as well as to a penalty under the State law in the state courts.[2] It is to be noted that previous acts divesting articles of protection against state legislation while in interstate commerce, applied only where interstate commerce was being used as a means of circumventing state laws, while by this statute, the state authority is permitted to act upon articles being transported in breach of a Federal law. Formerly the article was stripped of Federal protection to enforce the law of the state; here it is in addition, a sort of penalty imposed for violation of the Federal regulation.

A further example of the use by Congress of its power over interstate commerce to aid the States in the enforcement of their laws is found in Public 256 which makes it unlawful for any person to deliver to a common carrier for transportation, or for any person knowingly to transport or carry in interstate or foreign commerce any black bass which has been caught, sold, purchased, or possessed in violation of the law of the State or Territory wherein the delivery of the bass for transportation is made or the carrying thereof begins. A criminal penalty is provided for violation. The Act is much the same as the Act of May 25, 1900, commonly known as the "Lacey Act", applicable to wild animals and birds. That Act has never been passed on by the Supreme Court, but has been sustained

*A prior judicial interpretation was that the states were prevented from acting in such cases even before any action by the Secretary. Oregon-Washington Railway Co. v. Washington, 46 Sup. Ct. Rep. 279.

1. Re Rahrer, 140 U. S. 545.
2. U. S. v. Lanza, 260 U. S. 377. See also footnote 6.

by the Circuit Court of Appeals for the Eighth Circuit.[3] The Supreme Court has, however, held[4] that State legislation forbidding the transportation of game birds beyond the State is constitutional.

In Brooks v. United States,[5] the Supreme Court sustained the constitutionality of the National Motor Vehicle Theft Act, making it a criminal offense to transport stolen motor vehicles in interstate or foreign commerce. In that case Chief Justice Taft, in delivering the opinion of the Court, cited Clark Distilling Co. v. Western Maryland Co.,[6] as holding that "Congress had power to forbid the introduction of intoxicating liquors into any State in which their use was prohibited in order to prevent the use of interstate commerce to promote that which is illegal in the State." If Congress has such power it would seem to follow that they have equal power to prevent the use of interstate commerce to promote that which is illegal in the State by forbidding transportation in interstate commerce of articles acquired by breaches of state law. The Court in the Brooks case appears to attach some importance to the speed with which automobiles move and the "ease with which evil-minded persons can avoid capture." The well-known right of the State to protect and foster game and fish may support the new Act, but whether or not the doctrine will be extended to ordinary chattels remains to be seen.

The recent decision of the Supreme Court in Myers v. U. S. will probably have the effect of making void the provision in the Budget Act[7] that the Comptroller General can only be removed by joint resolution of Congress after hearing, so that officer will no longer enjoy the freedom from Executive control which it was the purpose of the Budget Act to give him. He will no longer be so much an officer of Congress to which the Executive or Congress itself has shown a tendency to limit his authority to construe its acts through his power to pass on expenditures. In 1924, in an attempt to prevent his reviewing the interpretation of the Federal Employees Compensation Act by the Commission in allowing compensation in individual cases, Congress provided that in the absence of fraud of mathematical error the findings of fact in, and the decision of the commission upon, "the merits of any claim" shall, if supported by competent evidence, not be subject to review by any other administrative or accounting officer of the United States.[8]

In 1926 occurs another instance. Public 472 amends the World War Adjusted Compensation Act, more commonly known as the Bonus Act, in several particulars in the interest of greater liberality than was afforded by decisions of the Comptroller General. The bill as passed by the House contained a provision intended to take away from the Comptroller General in the future any right to decide any of the questions arising under the Act. This provision was struck out by the Senate and the Senate amendment was agreed to by the House, apparently on the theory that another provision of the Act makes the decisions of the Secretary of War, Navy, and of the Director of the Veterans' Bureau "final and conclusive." Whether or not this language will be sufficient to compel the Comptroller General to refrain from passing on questions of law under the Act is problematical.[9]

Based upon complaint from the Federal Reserve Board and the Federal Farm Loan Board, Public 279, was enacted to prevent misuse of the terms "Federal", "United States", or "Reserve" and to prevent false advertising of securities issued by the Government or its agencies.

Section 1 provides that no corporation, association, partnership, or individual not organized under the Federal Farm Loan Act shall (1) advertise or represent that it makes Federal farm loans or advertise or offer for sale as Federal farm loan bonds any bond not issued under the provisions of the Federal Farm Loan Act, or (2) make use of the words "Federal", or "United States" or any other word implying government ownership, obligation, or supervision, in advertising or offering for sale any security not issued by the United States or under the provisions of the Federal Farm Loan Act or other Act of Congress.

Section 2 provides that no bank, trust company, corporation, association, partnership, or individual engaged in the banking, loan, building and loan, brokerage, factorage, insurance, indemnity, or trust business shall use the words "Federal", "United States", or "Reserve", or any combination of such words as a portion of its corporate, firm, or trade name or title or of the name under which it does business. The section is not to apply to the Federal Reserve Board, the Federal Farm Loan Board, the Federal Trade Commission, or any other branch of the United States Government, nor to any Federal Reserve Bank, Federal land bank, or Federal Reserve agent, nor to the Federal Advisory Council, nor to any corporation organized under the laws of the United States, nor to any concern actually engaged in business under such name or title prior to the passage of the Act.

Section 3 prohibits any bank or trust company not a member of the Federal Reserve System from advertising or representing in any way that it is a member, and from publishing or displaying any sign, symbol, or advertisement "reasonably calculated to convey the impression" that it is a member.

Violation of the Act is punishable by a fine not to exceed $1,000, and any officer of a corporation or association or member of a partnership who participates in or knowingly acquiesces in a violation is subject to a fine of not over $1,000, or imprisonment for not over one year or both. Violations of the Act may be enjoined by the appropriate district court at the instance of any United States district attorney, the Federal Reserve Board, the Federal Farm Loan Board, or any Federal reserve bank, Federal land bank, or Joint Stock land bank.

Sections 1 and 3 seem to be within the power of Congress as necessary for the protection of the Federal Reserve and Federal Farm Loan systems.

3. Rupert v. United States, 181 Fed. 87.
4. Geer v. Connecticut, 161 U. S. 519.
5. 267 U. S. 432.
6. 242 U. S. 311.
7. Act of June 20, 1921, Sec. 303, 42 Stat. 20.
8. 43 Stat. 389. Chap. 261.

9. Even the courts have been called upon to clip the wings of the Comptroller. In McCarl v. Cox, 53 Washington Law Reports, 758, holding that the Comptroller has no right to order deduction from the pay of a Navy officer to recoup the government for allowances made the officer, which the Comptroller holds improper, the Court said: that the officer would be compelled to sue the Government in the Court of Claims and therefore would have imposed "upon him the burden of proving a negative, or that he was not indebted to the United States, instead of compelling the Government to assume the burden rightfully upon it of establishing its contentions by affirmative proof. No such power as is here contended for ever has been conferred upon any official and it is entirely inconsistent with our theory of government. It may be added that the persistence with which the authority to exercise this arbitrary power has been urged, in the circumstances, clearly demonstrates the wisdom of Congress in not conferring it."

In so far as section 2 relates to the business of banking, it seems within the precedent of section 5243 of the Revised Statutes, which has never been questioned, and which prohibits the use of the word "National" by any bank not organized under the National Banking Act. The extension of the prohibition against using the words "Federal" or "United States" by persons engaged in the brokerage, factorage, and insurance business does not have the same reason back of it, and if valid it would seem that the validity must result from a general power in Congress to prevent the use of words descriptive of the sovereignty of the United States in such manner as to mislead.

In an effort to speed up the processes of naturalization and relieve Federal judges from increasingly burdensome demands upon them, Public 358 authorizes United States district judges in their discretion to designate officers of the Bureau of Naturalization to conduct preliminary hearings upon petitions for naturalization and to make findings and recommendations. The findings of the examiner are to be submitted to the court with recommendation that the petition be granted or denied or continued, accompanied by lists containing the names of the petitioners classified according to the character of the recommendations. The judge, if approving such recommendations, signs his name to the lists after making such changes as he deems proper. Under the old system the petitioner and his witnesses were obliged to appear in open court and give their testimony. This resulted in great waste of time, both of the court and of the individuals concerned, since in the majority of cases the judge would admit to citizenship any petitioner not objected to by the Government representative. It is provided that the court may in its discretion, and must upon the demand of the petitioner, require the examination of the petitioner and his witnesses in open court.

Two acts passed for the District of Columbia form those interested in Government organization. Public 47 creates a Board of Public Welfare for the District composed of nine members appointed by the Commissioners of the District. Members must have been legal residents of the District of Columbia for at least three years, but appointments are to be made without discrimination as to sex, color, religion, or political affiliations. Members serve without compensation and may be removed at any time for cause by the Commissioners of the District. The chief executive officer is to be a director of public welfare to be appointed by the District Commissioners upon the nomination of the Board. The Board is given jurisdiction over workhouses, reformatories, jails, municipal hospitals, and other correctional and charitable institutions, with authority to make rules for the admission to and the administration of these institutions. The Board is also given general charge of measures for the relief of the poor and insane and is to have the care and legal guardianship of children committed by courts, but the Board is directed when placing a child with a private home or institution to take care that the home or institution is in control of persons of like faith as the parents of the child.

Public 460 amends the District of Columbia Traffic Act, 1925, so as to extend the authority of the director of traffic to all classes of traffic, animal, pedestrian, and vehicular. It had been held that under the original Act the authority of the director was limited to the control of motor vehicles.

The Act provides for issuing motor vehicle operators' permits for a period not in excess of three years, renewable for periods of three years. All outstanding permits are to be called in by the director and reissued within a period of one year. Judges of the police court or their subordinates shall note, upon the space provided therefor on the operator's permit, convictions for speeding and reckless driving, fleeing from the scene of an accident, driving while under the influence of intoxicating liquor or narcotic drugs, and using a smoke screen.

The director of traffic or any designated assistant may, with or without a prior hearing, revoke or suspend an operator's permit for any cause deemed sufficient, the reasons to be set out in the order, which shall take effect 10 days after its issuance unless the holder of the permit files written application with the Commissioners of the District of Columbia for a review. If the Commissioners sustain the order, it becomes effective immediately; if the Commissioners reverse the order, it is thereupon vacated. It is further provided that in case of denial, suspension, or revocation, application may be made to any justice of the Court of Appeals of the District of Columbia for a writ of error to review the order of the director or his assistant, or the decision of the Commissioners in case application for review by them of an order for revocation or suspension has been filed. The application to the court for a writ of error does not operate as a stay of the order of the director or his assistant or the decision of the commissioners. The decision of the Court of Appeals is made final.

The Act also seeks to make clear the authority of the director of traffic to restrict the speed of vehicles below twenty-two miles per hour and to raise the speed limit in such outlying districts and upon such highways as he may designate.

Illinois Law Review's New Editor-in-Chief

(From Illinois Law Review, June)

This issue of the REVIEW completes two years of joint editorial control by the law schools of the University of Chicago, University of Illinois, and Northwestern University. With the publication of this number, the office of editor-in-chief passes to Professor Ernst W. Puttkammer of the University of Chicago. Professor Puttkammer has been a regular contributor to the REVIEW for the last two years and he is also widely known to the legal profession as the book review editor of the *American Bar Association Journal*. Professor Puttkammer will be the fifth in the series of the REVIEW's head editors. Professor Frederick C. Woodward, then of the law faculty of Northwestern University and now vice-president of the University of Chicago, was the founding editor. Professor Woodward was succeeded by Professor Roscoe Pound, now dean of the Harvard Law School, who was succeeded by Professor George P. Costigan, Jr., now of the School of Jurisprudence of the University of California. Professor Puttkammer brings to his office sound scholarship, industry, and an outlook that will preserve all that is of enduring value in the policies and traditions of the REVIEW.

AMERICAN BAR ASSOCIATION JOVRNAL

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues, $6. Price per copy, 25 cents.

JOSEPH R. TAYLOR, MANAGER
Journal Office: Room 1119, The Rookery Bldg., 209 South La Salle St., Chicago, Illinois

BAR ASSOCIATION LEGISLATIVE PROGRAMS

There are two effective forms of cooperation. One is to do something that will assist. The other is to refrain from doing something that hinders. The numerous legislatures which meet early next year have an opportunity to employ both forms in aid of the forces that are attempting to bring about improvements in the administration of justice.

Most of the State Bar Associations have legislative programs for presentation at the coming sessions. Some are extensive, embracing not only proposals that the association thinks have a chance for adoption at this time, but also others which it feels are right in principle but not likely to find early acceptance. Restoration of the rule-making power to the judges; restoration of their power to comment on the evidence and credibility of witnesses to the jury; changes in civil procedure; changes in codes of criminal procedure, more or less numerous; establishment of judicial councils; adequate compensation for judges; model reformatories and hospital prisons for the insane and mentally defective; raising standards of legal education,—these are only a few scattered but important items taken from the programs of state and allied organizations.

Theoretically—or rather from the layman's viewpoint—legislative proposals by bar associations occupy a peculiarly favorable position. A large proportion of the members of every legislative body are lawyers, most of them perhaps members of the state association itself. It is thus taken to be a case of lawyers making legal proposals to lawyers—to those peculiarly fitted to understand them and, presumably, to some extent in sympathy with them.

Unfortunately this does not represent the situation accurately. The lawyer members are not there on professional business and they often have other matters on hand which they regard as more important to their constituencies. Legislation is to a great extent a matter of give and take, of compromise and concession, and not all legislators are willing to exhaust their capital of this sort in support of the proposals of an organization which seems to them amply able to wait for its reforms. In other words, as every bar association legislative committee knows, the program has to fight its way and take its chances like any other measure or series of measures.

However, there are evidences here and there of an improving technique on the part of those presenting legislative proposals sponsored by bar associations or allied organizations. The Missouri Association for Criminal Justice furnishes an interesting illustration. Instead of urging all the changes suggested as a result of the recent comprehensive survey in that state, thus filling the legislature hopper too full, its officials have recently been pursuing a process of careful selection, with the idea of presenting the items which they have reason to believe can be urged with the best prospects for success. And in this process of selection they are availing themselves of an advisory council which embraces in its membership leading representatives of both houses of the legislature.

California furnishes another illustration. Its Bar Association's successful campaign to have the last legislature adopt certain important proposals was based largely on a state-wide appeal not only to professional but to public opinion. That is the sort of thing the legislator is particularly likely to respond to. The fact that the Governor did not approve the legislative action does not reflect on the validity of the Bar Association's method. In every campaign for legislative action an effort should be made to enlist as far as possible the interest of the public.

It is hardly necessary to stress the importance of concentration on certain special items of a program, once the legislative sessions have begun. Unless all the proposals are in some way bound together, and are

more or less interdependent parcels of a general plan, it is hardly likely that any large proportion of a program will get through. In the process of selecting what to concentrate on the legislative committee of an association has a most important task in the discharge of which the counsels of legislative experience are of great value.

Shall the committee concentrate its efforts to secure the passage of what are really the most important items, but which may have little chance of success at that session, or shall it devote its main attention to proposals not quite so important but for which the public and the legislative mind seem better prepared? Shall it go on the theory that its business is to push the whole program as recommended, and let the results take care of themselves, or to get some immediate results, however incomplete, from the efforts expended? These are matters which the committees must decide and which, in view of the fact that many of their members know a good deal about legislatures, they are doubtless quite competent to settle.

Of course no proposal can go before any legislature which is quite as important at this time as that to restore to the judges the power to make rules. In our opinion this is an inherent power of the courts which they can rightfully resume of their own motion, but in most states the attempt will be made to accomplish this purpose by legislative action. In an increasing number of states this right has been regained. Delaware and Washington are the latest accessions. Illinois and Oregon have put this at the forefront of their programs, and probably other associations have done so. Certainly no committee pushing a measure of this sort can lack all the argumentative ammunition that can possibly be demanded. Ultimately we trust every association will insist upon this needed reform by one or the other method, for upon it depends the success with which justice is to be administered among us.

Restoration to the judge of the power to comment on the weight of the evidence and the credibility of the witnesses is another item on several programs the importance of which cannot be over-emphasized. Adequate salaries for judges is another, and committees may well devote no small part of their efforts to seeing that tardy justice is done to the judiciary. Longer terms for judges, where these are at present too short, according to the ideas of an earlier day, are also worth making a fight for. This list is, of course, not intended to be exhaustive.

Each bar association knows its own local conditions and each committee doubtless has a fair idea of what can and what cannot be done just at this time. With proposals that are more or less local in their character, brought about by the local conditions, the profession as a whole is not greatly concerned. But in almost every legislative program there are proposals which embody ideas of general significance, which have made their way in the profession during a long period of discussion, and the fate of these at the coming sessions in 1927 will attract general attention.

In addition to measures prepared and presented directly by the state associations, the legislatures will have before them a number of new proposed uniform state laws. At the meeting at Denver the Conference of Commissioners completed their long and careful consideration of these measures, and the American Bar Association thereupon gave its official approval and recommended their adoption. Perhaps the most important of these is what is known as the Uniform Motor Vehicle Code, which deals, as its name implies, with a problem of great present importance. Secretary Bogert of the Commissioners gives a brief account of these proposals in this issue.

The legislative activities of the committees representing the American Bar Association in matters pending before Congress will, of course, begin somewhat earlier. At the head of the national organization's program in this field are, of course, the procedural reform bill and the bill fixing salaries of the Federal Judges. A list of the other principal measures approved or reapproved at the Denver meeting will be found on page 526 of the August issue.

Even a cursory glance at this program as well as the programs of the state bar associations shows very clearly that there is nothing self-serving in the efforts of these organizations in the legislative field. The general idea that runs through most of the proposals is that of doing what is possible to improve the administration of justice. They are devised emphatically in the public interest. We do not hesitate to say that no group of men, professional or otherwise, comes before Congress or the legislatures today with a program more open and above board and freer from all suspicion of mere self-interest than the bar associations of the country.

INTERNATIONAL LAW: ITS ACCEPTANCE AND ENFORCEMENT IN THE U. S.

International Law as Part of the Common Law—In the Federal Constitution—Judicial Decisions, After Adoption of Constitution, Declaring It Part of the Law of the Land —Federal Legislation and International Law—States of the Union and International Law—Nature and Sources

By Charles Pergler

INTERNATIONAL law as part of the common law. In a case decided in 1761 Lord Mansfield quoted with approval an even earlier opinion of Lord Talbot (1736) to the effect that "the law of nations, in its full extent, was part of the law of England."[1] When, therefore, Blackstone in his Commentaries declared that in England the law of nations is "adopted in its full extent by the common law, and is held to be a part of the law of the land"[2] he had sufficient judicial precedent for the pronouncement.

The foundation of the jurisprudence of all the American states is the English common law,[3] the only exception being Louisiana, where the civil law is applied in controversies of a civil nature; but even in that state the common law prevails in criminal matters.[4] It is generally held that the common law was brought to America by the English settlers on the settlement of the colonies[5] and it is assumed that the Constitution of the United States was framed by the Constitutional Convention of 1787 and ratified by the colonies in contemplation of the continued existence of this legal system in each state, subject to such modification as necessarily followed from the delegation of enumerated powers granted to the central government.[6] The government of the Union being merely one of powers delegated directly or by necessary implication, the ruling was perfectly logical, and, indeed, inevitable, that there is no common law of the United States in the sense of a national customary law, or distinct from the common law as it prevails in the several states.[7] It is true, of course, that the federal courts are frequently called upon to enforce the common law in municipal matters, but they do this because it is the law of the state, not federal law.[8] It is equally true that the federal courts, in proper cases, determine what is, or what is not, the common law applicable to a particular cause by following federal precedents,[9] though where the question is new weight is given to the decisions of the state courts,[10] but the following of federal precedents, when they are found, is not due to the existence of any national common law, but is resorted to on the theory that judicial precedents do not constitute the rule, but are simply evidence of what the common law rule is.[11]

2. International law in the federal constitution. Nevertheless, while the common law is the legal system of the several states of the Union, and while international law as part of the common law is also the law of the several states, the fact remains that the necessity of meeting obligations imposed by international law had much to do with bringing about the formulation and adoption of the federal constitution, and that the rules of international law, particularly of public international law, have been primarily expounded by the federal, not the state, courts. A short review of the situation, with reference to fulfillment of international obligations, following the treaty of peace with Great Britain, but prior to the Constitutional Convention of 1787, may prove interesting.

The extent to which the former colonies at one time regarded themselves as sovereign and independent is now seldom realized. The condition is thus summarized by a recognized student of American constitutional development:

> A few contemporary instances are enlightening. Thus, Connecticut, in its statute adopting a declaration of rights and privileges in 1776, declared itself a "Republic" which "shall forever be and remain a free, sovereign and independent state;" Massachusetts, in its Constitution of 1780, declared itself "a free, sovereign and independent body politic by the name of the Commonwealth of Massachusetts." Samuel Adams used to write of the "Republic of Massachusetts Bay." The booksellers advertised for sale in the newspapers copies of "The Constitutions of the several independent States in America." General Henry Knox (a most ardent Federalist) in drafting the frame for the Society of Cincinnati in 1783, spoke of the war as having resulted in the establishment of the colonies as "Free, Independent and Sovereign States." In the treaty of peace, Great Britain acknowledged the United States, naming each state separately, to be "free, sovereign and independent states." The state courts, and later the early federal courts, used similar language. The Pennsylvania legislature recited, in a statute of December 3, 1782, that "whereas by the separation of the thirteen United States from Great Britain, the Commonwealth of Pennsylvania hath become a sovereign and independent state, and in consequence of such separation, a government established solely on the authority of the people had been formed."[12]

Under the Articles of Confederation there was no executive, beyond the committees the Congress of the Confederacy might see fit to establish, and conditions were such that the decisions of this body

1. Triquet vs. Bath, Burrage: Reports, vol. III, p. 1478; Stowell & Munro, International Cases, Houghton Mifflin Co., Boston, 1916, vol. I, p. XXI; James Brown Scott, Cases on International Law, West Publishing Co., St. Paul, 1922, p. 2.
2. Blackstone, William, Sir, Commentaries on the Laws of England. Callaghan & Co., Chicago, 1899, Book IV, Chapter IV. (Cooley's Blackstone.)
3. Pattillo vs. Alexander, 96 Ga., 60; 29 L. R. A. 616.
4. Note, 22 L. R. A. 502.
5. Gatton vs. Chicago R. I. & P. C. R. Co., 95 Iowa, 112; 28 L. R. A., 556; Rhode Island vs. Massachusetts, 2 Peters, p. 751.
6. Smith vs. Alabama, 124 U. S., 456; 31 L. Ed., 508.
7. Smith vs. Alabama, supra.
8. Pennsylvania vs. Wheeling, etc., Bridge Co., 13 Howard, 518; 14 L. Ed., 518.
9. Farmer's National Bank vs. Sutton Mfg. Co., 52 Fed. Rep., 191; Faulkner vs. Hart, 82 N. Y., 413.
10. Farmers' National Bank vs. Sutton Mfg. Co., supra.
11. Franklin vs. Twogood, 25 Iowa, 529.
12. Warren, Charles, The Supreme Court and the Sovereign States, Princeton University Press (1924).

were little more than recommendations, to be observed, or ignored, by the states as these might deem proper or merely expedient.[13] It is not surprising that it has been remarked: "Without authority to require the states to regard the principles of international law and incompetent even to punish piracy or felony on the high seas, it was truly a pitiable spectacle that the United States presented." [14]

In the Constitutional Convention, in discussing the defects of the Articles of Confederation, Randolph pointed out, among other things, that under them the United States "could not cause infractions of treaties or of the law of nations to be punished,"[15] and James Madison, in his speech in the Convention, against the New Jersey Plan, asked, "Will it prevent the violations of the law of nations and treaties, which, if not prevented, must involve us in the calamities of foreign wars? The tendency of the states to these violations has been manifested in sundry instances . . . ." [16] It is again James Madison who gives us a glimpse of the care with which the phraseology and terminology of the Constitution was considered, with reference to questions of international law. In defending what was, until ratification, the Philadelphia project, in the Virginia convention, Madison explains the use of the expression "piracy" and says that "piracy is a word which may be considered as a term of the law of nations. Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorized to introduce it into the laws of the United States." [17]

The Convention was a body of practical men and did not go, nor, probably, would it have been permitted to go, beyond the necessities of the case. Those necessities required uniformity with regard to crimes committed on the high seas and uniformity concerning definition of offences against international law. Said Madison again: "if the laws of the States are to prevail on this subject, the citizens of different states will be subject to different punishments for the same offence at sea. There will be neither uniformity nor stability in the law." [18] Hence section eight of article one of the federal Constitution gives Congress power "to define and punish Piracies and Felonies committed on the high-seas, and Offences against the Law of Nations." Since international law is not, and cannot be, the creation of any one nation, the Convention could give Congress no more than the power of definition and punishment, and even the grant of this power of definition gave rise to certain apprehensions, Mr. Wilson remarking that "to pretend to define the law of nations which depended on the authority of all Civilized nations of the world, would have a look of arrogance that would make us ridiculous"; but Gouverneur Morris responded that "the word define is proper when applied to offences in this case, the law of nations being often too vague and deficient to be a rule." [19]

Even more important than uniformity in observance of the rules of customary international law was the necessity of enforcement of treaty obligations. While the Revolutionary War was in progress some of the states enacted laws providing that debts due British creditors should be paid into the local treasury and that such payment could be pleaded in bar to any future action for the recovery of those debts. As a result there was embodied in the treaty of peace with Great Britain an article according the creditors the usual judicial remedies; but the state courts refused to enforce this treaty provision, deeming themselves bound by state enactments, and, consequently, the treaty in this respect became a mere scrap of paper. It was this situation that brought about the constitutional provision declaring treaties the supreme law of the land, binding judges in every state, anything in the constitution or laws of any state to the contrary notwithstanding.[20]

Again, the judicial power of the United States extends not only to all cases, in law and equity, arising under the constitution and the laws of the United States, but under "treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction", and "to controversies . . . between a state, or the citizens thereof, and foreign states, citizens or subjects." [21]

Thus, under the constitution, Congress has considerable powers within the sphere of international law and the federal courts have extensive jurisdiction whenever cases under it arise. But it is well to remember that the great body of international law which concerns itself with the rights of private individuals, and is generally called private international law, does not come within the scope of federal legislation, except as it may be brought there by proper exercise of the treaty making power. Article three, section two, paragraph one of the federal constitution is jurisdictional and simply makes the federal courts the proper forum in a certain class of cases, while paragraph ten, of section eight, article one of the constitution, concerning felonies and piracies committed on the high seas and offences against the law of nations, relates wholly to acts of a criminal nature. This is so not only by reason of the rule that where general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose,[22] but also because the term offense is applied to breaches of laws enacted for the protection of the public as distinguished from an infringement of mere private rights,[23] and the expression relating only to punish-

13. Farrand, Max, The Framing of the Coastitution, Yale University Press (1923), pages 4-5.
14. Farrand, Max, The Framing of the Constitution, supra.
15. Farrand, Max, Records of the Federal Convention, Yale University Press (1911), p. 19.
16. Elliott, J., Debates on the Adoption of the Federal Constitution, J. B. Lippincott Co. (1891), Vol. IV, pp. 207-210.
17. Farrand, Max, Records of the Federal Convention, supra. vol. III, p. 332.
18. Madison's Journal, G. B. Putnam's Sons (1908), vol. II, p. 186.
19. Farrand, Max, Records of the Federal Convention, supra. vol. III, p. 6151.
20. Federal Constitution, Article six, section two; Ware vs. Hylton (1796), 3 Dallas, 199.
21. Federal Constitution, Article three, section two, par. one.
22. United States vs. Bevans, 3 Wheaton, 336, 4 L. Ed., 404; Caminetti vs. United States, 242 U. S. 470, 61 L. Ed., 442.
23. 29 Cyc., pp. 1351-52, and cases cited.

able violations of law, either felonies or misdemeanors.[24]

3. *Judicial decisions, after adoption of the constitution, declaring international law part of the law of the land.* The courts of the United States lost no time in affirming the principle that international law is part of the law of the land. Before the end of the century, the last quarter of which saw the establishment of American independence and the adoption of the constitution, Mr. Justice Wilson laid down the principle that "when the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement." [25] This was followed by a declaration of Chief Justice Marshall, in 1804, that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.[26] Later, in 1815, the Chief Justice reaffirmed this position and held that until an act of Congress has been passed "the court is bound by the law of nations, which is a part of the law of the land." [27]

The position proclaimed so early in the history of the Supreme Court this tribunal has consistently maintained. Indeed, in some instances it has chosen to adopt language even stronger than that of John Marshall. Thus in 1895, speaking for the court, Mr. Justice Gray holds that international law, in its widest and most comprehensive sense, is a part of the law of the land, and must be ascertained and administered by the courts of justice as often as questions involving international law are presented in litigation between man and man and duly submitted for the decision of the courts. The Justice emphasizes that he has in mind not only questions of right between nations when he speaks of international law, but questions of what international jurists call private international law, or the conflict of laws, as it is otherwise frequently called, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation.[28] In a still later case, and one which has become a leading decision in the latter day history of international law, it is again Mr. Justice Gray who holds that "international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." [29] In administering this law the court does not consider itself "at liberty to inquire what is for the particular advantage or disadvantage of our own or another country." [30]

Enforcement of international law by the courts, whenever proper and possible, undoubtedly makes for progress in orderly international relations, but, from the point of view of the practicing lawyers, it has also the important and practical result that the law of nations, unlike foreign municipal law, does not have to be proved as a fact and is taken judicial notice of by the courts.[31]

4. *Federal legislation and international law.*—A declaration that international law is law of the land, is of course, a broad and sweeping statement and under certain circumstances, standing alone, might even prove misleading, since it is susceptible of being understood as meaning that the law of nations must prevail, and does prevail, in the courts of the United States, under all circumstances. Obviously, simple reflection will show that this cannot be so.

What the decisions mean, and are intended to mean, is, that when international law can be applied without running counter to a statutory provision, of congress or of a state legislature, and when it is also not in conflict with an executive act or declaration governing the case, international law will be given effect and the courts will notice judicially what the international law is in a particular instance. This position is evident enough from the forceful language of Marshall who clearly concedes that if an act of Congress violates the law of nations, it is the act of Congress which must be enforced; no other construction can be placed upon a statement that *until an act of Congress has been passed* the court is bound by the law of nations. Expressed affirmatively, the rule is that when an act of Congress has been passed, the courts have no option but to enforce it, regardless of the rules of international law. The injured party would have a remedy, if any, in the usual diplomatic procedure. If a treaty must yield to the provisions of a congressional enactment, passed subsequently to the treaty,[32] a different rule certainly cannot prevail with regard to the frequently less certain obligations of customary international law. The courts in such case will, and must, enforce the statute, leaving the violation of international law, if any, to adjustment through the usual channels of international intercourse.

The problem we are dealing with here is not so much one of superiority or inferiority of any branch of law, but of its enforceability in courts that derive their jurisdiction and all their power from constitutions, state and federal, and laws enacted under these constitutions. One may well believe that international law is superior to constitutions—and municipal law in the sense that it is the law of all nations and stands above all other laws in moral weight, and yet realize that international law cannot be given effect by municipal courts where it clashes with provisions of municipal law. Theoretical considerations may lead us to desire a different rule, but it requires no prophetic gift to say that no court, federal or state, will ever declare a statute invalid on the sole ground that it is contrary to international law.

"International law forms an important part of the law of civilized states. To what extent and in what manner its rules are recognized by the law of any given state is a question which depends on the municipal law of the particular state." [33] Within the state nothing can be recognized as law by the courts except that which is commanded by the state.[34] This may seem a statement of the obvious, but it appears appropriate to enter into some consideration of what appears axiomatic, if for no other reason, because of the fact that only recently the contention has been advanced that treaties as well

24. Com. vs. Rowe, 113 Ky., 482, 66 S. W., 29.
25. Ware vs. Hylton, 3 Dallas, 199, 1 L. Ed., 568.
26. The Charming Betsy, 2 Cranch, 64, 2. L. Ed., 208.
27. The Nereide, 9 Cranch, 388, c L. Ed., 769.
28. Hilton vs. Guyot, 159 U. S., 677, 40 L. Ed., 95.
29. The "Paquette Habana," 175 U. S., 677, 44 L. Ed., 320; The Lusitania, 251 Fed. Rep., 715.
30. The Peterhoff, 5 Wallace, 28, 18 L. Ed., 564.
31. The Scotia, 14 Wallace, 170, 20 L. Ed., 822; The New York, 175 U. S., 187, 44 L. Ed.; 136.
32. See The Chinese Exclusion Case, 130 U. S., 581.
33. W. S. Holdsworth, A History of English Law, Methuen & Co. Ltd., London (1925), vol. IV, page 25.
34. But see sec. 6, infra, on "Nature and sources of international law."

as customary international law are superior to municipal law and that in cases of conflict the latter should yield to the former. The theory is thus summarized:

> "The conclusion here drawn is that not only are treaties and customary international law of authority superior to national statutes and the constitution of the United States, but also that national courts in the United States are bound in observing sound principles of law to act upon this fact. This position is denied today by the courts with respect to treaties and statutes, in reliance entirely upon an old and badly reasoned decision from an inferior court; it is in dispute with reference to statutes and customary international law, with a preponderance of authority in support of the conclusion here drawn; it is well recognized with reference to the Constitution and treaties or customary international law, although not as well recognized as it should be. Eventually the doctrine set forth here must prevail all along the line, in the interests of sound jurisprudence and practical convenience as well."[35]

It may be well worth while to examine the cases the author relies upon. The first case[36] is one of the French Spoliation Claims and involved an action of the administrator against the United States, a fact in itself quite suggestive of the nature of the case, the question presented being whether an American vessel convoyed by a British privateer in 1798 was liable to condemnation. One of the bases of the claim for compensation was the contention that a statute of the United States authorized resistance of American merchantmen to French visitation and search, and the court in an *obiter dictum* remarked that "no single state can change the law of nations by its municipal regulation." The aside, correct in itself, has no bearing, however, upon the question we are discussing, viz., the enforceability of international law, as municipal law, and does not support the author's theory, for the simple reason that the court was dealing not with a problem of municipal law of the United States, but an alleged claim of an American citizen, or, rather, his descendants, against the French government, and, manifestly, the only law applicable was international law.

The second case[37] is another of the French Spoliation cases and it resulted from the resistance of the vessel to search by a French cruiser in 1799, the resistance causing an action lasting 2½ hours, and the court said that "the municipal law in the absence of a treaty must be subordinated to international law when they come in antagonism, *as that is the law common to both parties.*" The sentence italicized shows sufficiently that the question was one of applicability of a given law, a situation common enough in all litigation, and therefore not a superiority or inferiority of any branch of the law. But who were the parties the opinion speaks of? The tribunal answers this by saying that "this court in making the investigation contemplated by the act of our jurisdiction is sitting in the character of an international tribunal, *to determine the diplomatic rights of the United States as they existed against France prior to the ratification of the treaty of September 30, 1800.*" The parties, therefore, were two international law persons, the United States and France, and, again, the question was not one of international law as municipal law.

The author of the study referred to relies upon two other Court of Claims cases, but what has been said as to the first two applies to the remaining ones with equal force, for these, also, are of the group of French Spoliations,[38] the parties being two states, and in the last case the court declaring that "the statutes to which we have referred respecting the authority of Congress to authorize American merchant vessels to defend against French depredations did not change the law of nations or *impose a new international obligation* upon France as was held in the case of the Ship Rose, supra, page 283." In the French Spoliation cases the Court of Claims acted under a special act of Congress, as appears from the opinions clearly enough; without an act of Congress the Court of Claims would have had no jurisdiction; and in all cases the findings, with the opinions rendered, were simply certified to Congress, in the nature of recommendations, a fact in itself constituting a recognition of the power of the national legislature to carry out, or not to carry out, obligations imposed upon states by international law.

A direct ruling upon the question under consideration by the United States Supreme Court does not exist, but there is a statement from competent judicial authority to the effect that "it goes without saying that mere international comity not incorporated in any convention between the United States and a foreign power must yield to a statute with which it is in conflict."[39] This ruling was followed in a much later case, where the question was directly involved, and where, while the court reveals an underestimation of international law as a rule of conduct between states, the decision still is "that the rules of international law, like those of existing treaties or conventions, are subject to the express acts of Congress, and the courts of the United States have not the power to declare a law unconstitutional, if it be within the authority given to Congress as to legislation, even though the law itself be in contravention of the so-called law of nations."[40] A ruling still later made contains the declaration that "we make no question of the power of Congress to enact this law, for neither existing treaties, nor international law, could divest Congress of the power, if it chose to exercise it, of requiring military service of such resident aliens, as international law is not in itself binding upon Congress, and treaties stand upon no higher plane than statutes of the United States."[41]

Only recently it has been conceded that "it is quite true that in case of conflict between municipal and international law, the courts and executive authorities are bound by the former rather than the latter", and "that a state is entirely free to enact such legislation and may compel its own courts to apply it, its executive authorities to enforce it and its subjects to obey it", but "that the international responsibility of the state cannot be altered in the slightest by such contravening legislation."[42] The second contention is of course also true, but the fact remains that international law is not law between a state and the persons subject to its jurisdiction unless the state recognizes it as such.[43]

In an *obiter dictum* the Supreme Court has indicated that article one, section eight, of the Federal

35. Pitman B. Potter, International Law and National Law in the United States, American Journal of International Law, April, 1925, vol. 19, No. 2.
36. The Schooner Nancy (1822) 37 Court of Claims, 99.
37. The Ship Rose, 36 Court of Claims, 290.
38. The Schooner Jane, 37 Court of Claims 94; The Schooner Endeavor, Court of Claims, 242.
39. The Kestor, 110 Fed. Rep., 432.
40. United States vs. Bell, 248 Fed. Rep., 992.
41. United States vs. Siem, 299 Fed. Rep., 582.
42. Garner, James W., Presidential Address before The American Political Science Association, December 29, 1924, The American Political Science Review, February, 1925.
43. Burgess, John W., Political Science and Comparative Constitutional Law, Ginn & Co., (1915), vol. I, pages 54-55.

Constitution, authorizing Congress "to define and punish piracies and felonies on the high seas, and offences against the law of nations" does not permit Congress, however, to bring within the shelter of this clause any offence not recognized by international law by arbitrarily declaring it to be one. An act of Congress of April 30, 1790, declared murder as well as robbery on the high seas to be piracy, but the Supreme Court points out that murder and piracy are things so essentially different in their nature that even Congress cannot confound or identify them. If, by calling murder piracy, Congress might assert jurisdiction over that offence committed by a foreigner on a foreign vessel, what offence might not be brought within their power by the same device? the court properly asked.[44] Pirates, of course, are subject to punishment in any jurisdiction into which they may be brought and piracy is well understood to be robbery on the high seas,[45] and if Congress could by definition declare anything else to be piracy, it is obvious it could bring within American jurisdiction almost any conceivable offence as long as it was committed on the high seas. But this is primarily a question of constitutional, not international law, and if Congress does not possess the power thus questioned by the Supreme Court, the limitation is one imposed by the Constitution and not by reason of the superior authority of international law. As a rule of constitutional law the opinion would seem to be sound, for when the framers of the Constitution gave Congress power to punish piracies and felonies on the high seas and other offences against international law, they clearly had in mind such offences as were and are taken cognizance of by the latter, and they did not confer, and did not intend to confer, power to create new offences, committed abroad, or to change the very nature of any recognized offence, perhaps for the sole purpose of obtaining jurisdiction which otherwise could not be acquired. The usual canon of construction, that the expression of one thing in a constitution involves the exclusion of other things not expressed,[46] is also to be borne in mind, and from this point of view the Constitution excludes from the power of Congress anything more than punishment and definition of international offences. Congress may provide for the punishment of crimes on the high seas whether the acts penalized are felonies or crimes of a lesser degree.[47] However, an act of Congress need not expressly declare that its object is to punish or define an international offence if in fact it does so.[48]

Under the provision in question there exists a considerable body of legislation, mostly designed to safeguard the neutrality of the United States in case of conflicts with other countries. Just how far Congress could go in "defining and punishing" piracies and felonies on the high seas and offences against the law of nations is of course an interesting question for the constitutional, as well as the international, jurist.

5. *The several States of the Union and international law.* Once the view is taken that international has been "adopted in its full extent by the common law" it logically follows that it is a part of the law of every American state where the common law system prevails as the foundation of its jurisprudence. Judicial decisions to this effect are not lacking, though it must be remembered that questions of international law as such are relatively seldom presented to state courts for determination, and that more often the problem is to ascertain the particular jurisdiction of which the law should be applied to a given set of facts. Consequently the matter is usually treated under the title of conflict of laws.

Before the adoption of the Federal Constitution the Philadelphia court of oyer and terminer tried, convicted and sentenced at common law a French citizen for an assault on the secretary of the French legation, committed in the minister's residence, on the ground that the "crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this state, and it is to be collected from the practice of different nations, and the authority of the writers."[49] Other state courts have taken it for granted that international law is a part of the law of their states,[50] one of the latest state decisions (1919) holding that "international law is a part of the law of the United States, and must be administered whenever involved in causes presented for determination", though in a state court.[51]

What if an act of one of the state legislatures, and not of Congress, violates an established principle of international law? As the situation stands at the present time, clearly there would be only one course open to the courts, viz., to enforce the state statute, always assuming its constitutionality and that it does not contravene any valid federal enactment, or any treaty within the power of the central government and therefore the law of the land. This conclusion is inescapable if we proceed on the theory, as we must, in view of the decisions, that international law is a part of the common law, and no more, and if we bear in mind that the common law prevails in the states "except as modified, changed or repealed by statute or in so far as it is not inconsistent with the constitution, or the statutes, or the institutions of the state."[52] As between the state and persons and property subject to its jurisdiction, international law is subject to the same rules as other common law principles. This conclusion would in any event follow from the provisions of the Tenth Amendment to the Constitution providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," and from the fact that the states are sovereign except to the extent to which they have surrendered certain powers to the Federal Government.

The power of the separate states even in matters involving questions of international law and having a bearing on foreign relations has been illustrated a number of times, for instance in the New Orleans lynching cases and in the way the federal government thought it necessary to proceed in its attempts to dissuade California from passing enactments considered anti-Japanese; but perhaps never

44. United States vs. Pirates, 5 Wheaton, 184, 5 L. Ed., 163.
45. Life of Sir Leoline Jenkins, see Stowell & Munro, International Cases, Houghton Mifflin Co., Boston (1916), vol. I, p. 425.
46. Brown vs. Maryland, 12 Wheaton, 419, 6 L. Ed., 678.
47. United States vs. Rodgers, 150 U. S., 249, 37 L. Ed., 1071.
48. United States vs. Arjona, 120 U. S., 479, 30 L. Ed., 728.
49. Respublica vs. De Longchamps, 1 Dallas, 111, 1 L. Ed., 59.
50. Heirn vs. Bridault, 37 Miss., 209.
51. Riddell vs. Fuhrman, 233 Mass., 69, 123 N. E., 237.
52. Horace Watters & Co. vs. Gerard, 189 N. Y., 302, 82 N. E., 143; Harris vs. Powers, 129 Ga., 74, 58 S. E., 1038.

has it been quite so strikingly exemplified as in what are known as the *McLeod* and *The Caroline* cases. In view of some of the contentions already referred to [53] and to avoid even the slightest possibility of confusion of thought, it may be worth while to give here the material facts in these cases, and since they are succinctly given in a work on American foreign policy, for the sake of brevity the statement therein appearing is adopted here:

> During the Canadian rebellion of 1837 Americans along the border expressed openly their sympathy for the insurgents who secured arms and munitions from the American side. In December a British force crossed the Niagara river, boarded and took possession of *The Caroline*, a vessel which had been hired by the insurgents to convey their cannon and other supplies. The ship was fired and sent over the falls. When *The Caroline* was boarded one American, Amos Durfee, was killed and several others wounded. The United States at once demanded redress, but the British government took the position that the seizure of *The Caroline* was a justifiable act of self-defense against people whom their own government either could not or would not control.
>
> The demands of the United States were still unredressed when in 1840 a Canadian named Alexander McLeod made the boast in a tavern on the American side that he had slain Durfee. He was taken at his word, examined before a magistrate, and committed to jail in Lockport. McLeod's arrest created great excitement on both sides of the border. The British minister at Washington called upon the government of the United States "to take prompt and effectual steps for the liberation of Mr. McLeod." Secretary of State Forsythe replied that the offense with which McLeod was charged had been committed within the state of New York; that the jurisdiction of each state of the United States was, within its proper sphere, perfectly independent of the federal government; that the latter could not interfere. The date set for the trial of McLeod was the fourth Monday in March, 1841. Van Buren's term ended and Harrison's term began on the fourth of March, and Webster became secretary of state. The British minister was given instructions by his government to demand the immediate release of McLeod. This demand was made, he said, because the attack on *The Caroline* was an act of public character because it was a justifiable use of force for the defense of British territory against unprovoked attack by "British rebels and American pirates"; because it was contrary to the principles of civilized nations to hold individuals responsible for acts done by order of the constituted authorities of the state; and because His Majesty's Government could not admit the doctrine that the federal government had no power to interfere and that the decision must rest with the state of New York. The relations of foreign powers were with the federal government. To admit that the federal government had no control over a state would lead to the dissolution of the Union so far as foreign powers are concerned, and to the accrediting of foreign diplomatic agents, not to the federal government, but to each separate state. Webster received the note quietly and sent the attorney general to Lockport to see that McLeod had competent counsel. After considerable delay, during which Webster replied to the main arguments of the British note, McLeod was acquitted and released.[54]

British remonstrances, and all endeavors of the Federal Government, were not only fruitless, but the Supreme Court of the State of New York gave its own interpretation of the law governing the case, and, in the words of an American writer, "held that a subject of a foreign state was liable to be proceeded against individually, and tried on an indictment in the criminal courts for arson and murder, notwithstanding the acts for which the indictment was made had been subsequently avowed by his government, and it, consequently, refused to discharge him from custody. The opinion of the court was delivered by Mr. Justice Cowen and is of great length. So far as the question of national law is concerned, the opinion rests upon the proposition, that until war is declared by the war-making power, the officers or citizens of a foreign government, who enter our territory, are as completely obnoxious to punishment by our law as if they had been born and always resided in this country; that while two nations are at peace with each other, the acts of hostility by individuals must be regarded as private and not public acts, and that the courts will hold the parties individually responsible, notwithstanding the avowal of such acts by their government." [55]

Even though McLeod was finally acquitted by the jury on proof of an alibi, the fact that he was actually tried[56] only emphasizes the absolute control of the state authorities. In case of conviction the federal government would have been helpless, though undoubtedly Great Britain could have insisted upon the responsibility of the United States under international law. The situation was an inevitable result of the American constitutional system.

Congress, following the McLeod incident, passed the act of August 29, 1842, giving the federal courts jurisdiction over aliens claiming immunity for acts done under authority of their state, "the validity and effect whereof depend upon the law of nations." But does this act define an offense against the law of nations? Hardly, because the claim is that in such cases there is no offense on the part of the individual; but if the statute does not define an international offence, then it may be of doubtful constitutionality, though, probably, such cases could be reached by a proper treaty and legislation in pursuance thereof.[57]

Congress is not given exclusive power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations", and the states may legislate on the subject, unless and until the United States has assumed jurisdiction.[58]

Political developments have served to obscure the importance and power of state legislatures, but it is well to remember that within their constitutional sphere they are as supreme as any parliamentary body can be; that, as a matter of fact, state legislation deals with the life of an individual in all its possible phases, and that congressional legislation, under the present system, can never be, from the point of view of the individual, as all-embracing as that of the law-giving bodies of the separate states of the American Union. Bearing this fact in mind, we shall the better realize that state legislatures, too, have their international responsibilities, and that upon them, also, depend the observance of, and respect for, international law.

6. *The nature and sources of international law according to judicial decisions.* In the last analysis all law is the result of the experiences and needs of community life, and international law is primarily derived from the practice of civilized states,[59] its

53. See section on "Federal Legislation and International Law," supra.

54. Latané, John H., From Isolation to Leadership, Doubleday, Page & Co. (1918), pp. 103-105.

55. Halleck, International Law. People vs. McLeod, 1 Hill, 377; 37 Am. Dec., 328.

56. Stowell & Munro, International Cases, Houghton Mifflin Co., Boston (1916), Vol. I, page 123.

57. Missouri vs. Holland, 252 U. S., 416.

58. Thorpe, F. N., The Essentials of American Constitutional Law, G. P. Putnam's Sons, New York (1917), pp. 44-45.

59. Thirty Hogsheads of Sugar vs. Boyle, 9 Cranch, 191, 2 L. Ed., 701.

test being usage. "That which has received the assent of all must be the law of all." [60]

The nature of what Chief Justice Marshall called "the test of usage" is forcefully set forth in a case already cited.[61] In rendering one of his best known opinions (The Young Jacob and Johanna, 10 Rob. 20). involving the legality of capture of small fishing vessels, Lord Stowell said "that in former wars, it has not been usual to make captures of these small fishing vessels; but this was a rule of comity only, and not of legal decision . . . ." In discussing the expression Mr. Justice Gray observed that "assuming the phrase 'legal decision' to have been there used in the sense in which the courts are accustomed to it, as equivalent to 'judicial decision', it is true that, so far as appears, there had been no such decision on the point in England. The word 'comity' was apparently used by Lord Stowell as synonymous with courtesy and good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law." From this it logically follows that when changes in international law have occurred by common consent and practice of civilized nations, the courts will take judicial notice of the fact and in a proper case apply to controversies the law so newly expressed;[62] in other words, international law is a living thing, evolving and developing, and, it is to be hoped, improving.

Works of commentators and jurists, "who, by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat", are resorted to as evidence of what the international law is,[63] but the Supreme Court of the United States will not change its rulings to conform to the opinions of foreign writers as to what they believe the existing law to be on any particular subject,[64] and the decisions of the Federal Government upon problems of international law and international relations, which, by the Constitution, are entrusted to the Federal Government, are obligatory upon every citizen of the United States,[65] and where there is a controlling executive or legislative act, or judicial decision, such act or decision will be followed by the courts.[66] Judicial decisions in a degree give stability to international law, and, therefore, while not accepting them as authority, the Supreme Court does receive, and does consider, the decisions of courts of other countries in adopting rules prevailing in the United States.[67]

In a general way it has been said that international law is partly unwritten and partly conventional,[68] and in ascertaining the unwritten part the court will also resort to principles of reason and justice, and evidence of these is found in the works of learned jurists and in judicial decisions. In one of the earlier cases in the United States, involving questions of international law, Mr. Justice Chase said that "the law of nations may be considered of three kinds, to wit, general, conventional, or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent, and is only obligatory on those nations who have adopted it." [69]

The decisions of American courts not only as to recognition of international law in the United States, but also concerning its nature and sources, should end, at least for the practicing and practical lawyer, the perennial and rather unprofitable debate as to whether or not there is such a thing as international law. The courts apply this law whenever they can and they are clear concerning its nature and sources. At times it may be difficult to ascertain the rule applicable in a given case, but this is so even in our own day in many branches of municipal law. Instances of what are known as cases of first impression arise with a frequency not always realized. Law is a rule of conduct, and this is true of international, as well as of municipal law; and while municipal law has back of it the mighty enforcing arm of the state, international law finds its most effective sanction in the needs of civilized states. To secure them the observance of certain rules in their relations with other states is unavoidable and hence obligatory. In maintaining international law as a part of the common law, American courts have gone far in making of this law not only a rule of conduct for sovereign states, but for citizens as well.

Washington, D. C.

60. The Antelope, 10 Wheaton, 66, 6 L. Ed., 268.
61. The Paquete Habana, 175 U. S., 694, 44 L. Ed., 320.
62. The Scotia, supra.
63. Hilton vs. Guyot, supra.
64. The Adula, 176 U. S., 361, 44 L. Ed., 505.
65. Kennett vs. Chambers, 14 Howard, 38, 14 L. Ed., 316.
66. Hilton vs. Guyot, supra.
67. Thirty Hogsheads of Sugar vs. Boyle, supra.
68. Thirty Hogsheads of Sugar vs. Boyle, supra.
69. Ware vs. Hylton, supra.

Zoning Principles and Progress

The following statement issued on Oct. 31 by the Department of Commerce contains information with regard to the increasingly important subject of zoning:

Revised editions of "A Zoning Primer" and "A Standard State Zoning Enabling Act, under which municipalities may adopt zoning regulations," are announced by the Division of Building and Housing of the Department of Commerce. These publications, both by the Advisory Committee on Zoning, appointed by Secretary Hoover, rank among the most popular pamphlets issued by the Department, more than 50,000 copies of each having been sold by the Superintendent of Documents.

The "Primer" explains in popular style the methods by which zoning protects property and health and avoids unnecessary scrapping of serviceable buildings. It was first issued in 1922. Since that date the number of zoned municipalities in the United States has increased from less than a hundred to more than 450, and the constitutional status of zoning has been upheld in thoroughgoing decisions of the highest courts of such states as New York, Massachusetts, Ohio, Illinois and California. There has been a wealth of added experience in the application of zoning to the most varied problems in many types of cities and villages The revised edition takes into account the developments of the past four and a half years, and includes a list of zoned municipalities by states.

"A Standard State Zoning Enabling Act" has been embodied in the laws of 20 states since it was first issued in preliminary form three years ago. Court decisions on cases arising under it have been studied with the greatest care, and the only change made in the text is in the section on "Enforcement and Remedies," where the other means of securing compliance with zoning ordinances are strengthened by adding the following:

"The local legislative body may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder. A violation of this act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violation."

THE LAWYER, THE JUDGE AND THE LAW SCHOOL

Their Share in the Development of the Law—Specialized Functions Have Followed Increase of Complexity in Human and Legal Relations, but Each Class Can Make Distinctive Contribution—Cooperative Effort Needed to Investigate Facts Regarding Legal Institutions

By Walter F. Dodd
Member of the Chicago, Illinois, Bar

With the increased complexity of life we have an increased complexity of law. We cannot much reduce this complexity without at the same time changing the character of our civilization, for law is a mirror of life. With increased complexity has come more detailed specialization in the agencies that make, construe and develop the law. The time was when a Story or a Cooley could achieve three-fold distinction as judge, teacher and writer. But this time is past.

Pressure of judicial work has now largely deprived the judge of the opportunity to teach or to do systematic writing. The contribution of the judge to legal development must be primarily in his opinions. And it is highly important that the judges of the highest federal and state courts have sufficient time to mature their opinions. For whether a rule have its origin in common law or statute, it is the judicial statement of the law that finally controls. Statutes do not construe themselves, and though the legislatures may busily engage in enacting laws, such laws are still but raw material later fitted by decision into the legal structure builded by the courts.

In the constant building and re-shaping of the law, the courts have in our complex civilization a sufficient and arduous task in the preparation of their opinions. For as Justice Holmes has truly said:

> The reports of a given jurisdiction in the course of a generation take pretty much the whole body of the law, and restate it from the present point of view.[1]

Like the judge, the lawyer in active practice has little opportunity to write or teach. His time must be devoted to advising clients, and to such aid as he may through brief and argument give the court in the correct statement of the law.

The teaching of the law has become a separate profession within the past generation. This specialization is in line with new needs. It has brought improved efficiency in the law schools, and has made possible an improved technique of teaching.

But the law is a single institution, and the severance of the law teacher from practice has brought loss as well as gain. Dean Pound has said:

> Legislatures, if otherwise qualified, can give but intermittent attention to constructive law-making for the purposes of the legal order. Judges work under conditions that make it less and less possible for them to be the living oracles of the law except as they give authority to what has been formulated by writers and teachers. An interpretation that will stimulate juristic activity in common law countries, that will bring our writers and teachers to lead courts and legislatures, not to follow them with a mere ordering and systematizing and reconciling analysis, will have done its work well.[2]

For law teachers to aid progress they must know the actual living problems of the law. Their contribution may come through (1) teaching, (2) writing, (3) legal investigation. Under present conditions the law teacher has greater opportunity for systematic writing than the lawyer or the judge.

Teaching is the primary function of the law school. It must devote its first attention to teaching and to the implements of teaching, but the law school must not be subject to the reproach that the case-book is its highest evidence of legal scholarship.

Yet the methods of teaching have in themselves an important influence on the future of the law. Under the leadership of the Harvard Law School the case method brought an improved technique of teaching. At first the case method had to justify its existence in combat with other and better-established methods. Then it was at its best. With its present established position, every law school seeking to obtain recognition must advertise its use of the case method. The preparation of case books has become popular and profitable. As usual in life, a system ceases to be itself in the very act of gaining complete victory. The case method has to a large extent become a lecture method of teaching, with a case-book in the hands of the students.

In its inception, the case method devoted primary attention to earlier cases. As employed by some teachers, it attempted to distinguish and harmonize judicial decisions by reasoning whose casuistry could not and should not be duplicated in real life. The materials of the law were twisted out of their setting, and an effort made to fit into a logical whole decisions centuries apart. By this method law ceases to be a part of the changing life of the world. The better recent casebooks devote their main attention to modern cases, and thus emphasize more nearly the law that is now in existence. But much teaching still seeks to inculcate law as a logical system existing unchanged for centuries, rather than as a living reality adjusting itself constantly to the changing realities of life.

Legislation is now our chief means of adjusting the law to new conditions. But the judge, the lawyer, and the law school tend to regard legislation with contempt. It has little part in the organized

1. O. W. Holmes, The Path of the Law, 10 Harvard Law Review, 457, 458.

2. Interpretations of Legal History, 165.

system of teaching law. Legislation is deserving of criticism and improvement, but little is to be gained if the lawyers, largely responsible for its defects, stand on the "side-lines" and indulge in idle and futile comment.

The functions of the lawyer, the judge and the teacher have become specialized. Legislation remains an amateur function. Legislatures are not composed of experts and it is doubtful whether they should be. Their chief function is that of reflecting popular opinion upon matters of governmental and legal policy. Lawyers are in large numbers members and leaders of legislative bodies, but they are there primarily as politicians and not as lawyers. The membership of legislatures is not so permanent as that of the courts, and legislative sessions are of limited term.

Yet legislatures must be relied upon to make changes in legal policy. Their very defects make them respond more promptly to changed needs than do the courts and the lawyers. And in many cases, even though the courts recognize the need for change, a new principle can be established only by legislation.

If we can substitute constructive aid for idle criticism in the field of legislation, much good may be accomplished. We have too much legislation, but in many states its mass is greatly reduced when compared with that of earlier days. The great abuses of local and special legislation have been eliminated in most of the states. Those who have not thought of the matter will be impressed by comparing the five large volumes of Illinois laws for the session of 1869 with the greatly lessened product of every session since that time.

The present legislative danger is different from that of a few decades ago. It arises largely from the more systematized pressure of organized groups upon a non-expert and amateur body without information upon the matter except as it is furnished by interested groups urging and opposing new legislation. Legislation to meet new social needs tends at first to be crude and inartistic. Not only this but it must run the gauntlet of constitutional attack and judicial construction. And the courts are not always sympathetic in their attitude, even when the legislation seeks to accomplish a desirable end. Legislation may in truth be termed one of the most dangerous of the hazardous occupations.

In view of the conditions of legislation, it is not surprising that much of enacted law should be the result of slavish copying. An act adopted by the legislature of one state is oftentimes copied by another without inquiry as to its fitness. The first act may have been purely experimental and without basis of accurate information, but is copied with all its defects by the second. An illustration suggests itself. In 1917 there was a demand in Illinois for a statutory regulation of the quality of paints and oils sold in that state. A neighboring state had enacted such a law almost identical in detail with that of some other states, and the terms of that law were at once embodied in a bill for introduction. Upon a suggestion that the standards of the bill might not be in accord with scientific knowledge on the subject, advice was sought from the United States Bureau of Standards and other bodies. The bill was found fatally defective. Standards established by scientific research were substituted, the measure was passed without opposition and has since remained the law of the state. In this case the danger of copying was avoided, but in many cases this is not true. State constitutions, like state statutes are also largely the result of copying. Illinois in 1818 copied, without knowledge of its operation, the plan for a council of revision abandoned by New York in 1821.

The legislatures, even more than the courts, need the results of investigation of our legal institutions. Much of the defect in legislation is due to the fact that an amateur body must take the lead in legal reform, without the aid of lawyer, judge and teacher, and often against their opposition. Legislatures are not mere mischief-making bodies, without excuse for existence. They must often take the lead where persons who presume superiority interpose obstacles to progress. With greater knowledge of the operation of legal institutions, their task could be greatly simplified.

We hear much criticism of the growing mass of legislation, and this criticism is largely justified. But when we analyze the legislative output of Congress or of a particular state, we find relatively little of what we may term "law-making" legislation—legislation that changes or affects the legal system of the nation or of the state. Legislative sessions are largely devoted to appropriation measures and matters of administrative detail, which have little to do with the legal system for the determination of matters of public and private right.[2] The problem of improving the law through the establishment of a higher standard for legislation is, therefore, not so great as it at first appears. But to be of aid in maintaining a high standard of judicial and legislative product, we must know the living forces that make new laws. This is the task that Dean Pound has set for the law teacher.

The task is too great for the individual teacher alone. One who is to teach may have had a brief apprenticeship in practice, but through it alone he cannot obtain a knowledge of the broad problems of legal administration. Any practice on the part of the teacher must be incidental, and cannot keep him sufficiently in touch with the actual problems of the law. He can do little more than analyze and criticize the judicial output. Much of this present analysis and criticism is of great value, but is published in law reviews and its usefulness largely lost to the lawyer and the judge, because such reviews are not systematically consulted. In some cases it is arrayed in such a panoply of erudition that the mere lawyer or judge cannot pierce through to its real meaning. Where the law is out of joint with the times, this analysis of the judicial product may be sufficient to destroy the obsolete and bring improvement. Witness a Bentham and a Wigmore. But adequate results cannot be accomplished without a knowledge of the legal facts as well.

When a task is too big for the individual, or combined action may be more successful, the modern practice is to syndicate effort. We see this tendency now in the practice of the law, in legal writing, and in the development of legal services.

For legal practice, great offices have been built up, with enormous businesses, with the influence that comes to large financial organizations, and with subsidiary devices for the purpose of hurrying or

2. For a fuller development of certain matters here discussed, see Walter F. Dodd, State Government, Century Company, New York, 1922.

delaying cases in accordance with the need. In such offices the personal element of professional relationship tends to fall into the background. Employees are judged by their earning capacity and their success in winning cases, sometimes without reference to the merits and the methods employed. A junior member of such an organization, in showing a visitor through his "plant", recently remarked with pride that it was just like a department store. But we are not concerned here with the adjustment of such organizations to a higher standard of legal practice. Great law offices will continue, and can be conducted so as to avoid the criticism here indicated.

Legal services have likewise been built up for the use of lawyers and others. We have income tax, inheritance tax, traffic corporate, trust, "blue sky", and business law services. Such services are of value and in many cases the lawyer would be helpless without them. Sometimes they are objected to on the ground that they constitute a corporate practice of law, but on the whole they exist because their usefulness is established. They can be turned into aids for the improvement of the law.

In large fields of legal publication, we have syndicated writing. Digests covering the whole country have long been beyond the capacity of one individual. The same statement applies to the restatement of the law in encyclopedic form. Such publications are necessary as implements, and are invaluable for their classification of materials that must serve as the basis for further legal development. If they sought to develop new principles rather than merely to state what is the law based on decisions already rendered their field of usefulness would be impaired.

Finally we have a syndicated effort to make an authoritative restatement of the law. Through the American Law Institute, skilled groups have been brought together from the law school faculties and from practice. The purposes of such syndicated effort is not so much to promote the growth of the law as to state what the law is. In case of conflict of authorities, so far as such a statement adopts the view of later as opposed to earlier decisions, it will strengthen the later view and promote its general adoption. To some extent, however, it may entrench common law principles that ought to be changed. An authoritative restatement of the law of employer's liability, if made twenty-five years ago, would probably have placed additional obstacles in the way of the movement for workmen's compensation. But the effect of the work of the American Law Institute will not be one of retardation. The first step toward improvement of the law in any field is an authoritative understanding of what the law actually is. Having made such a restatement, its value will be the less if it is too long authoritative, although many principles of law do not and should not change rapidly. Here as in the encyclopedic works, the value of the undertaking would be largely destroyed by innovations, however desirable in themselves. Contributions to the readjustment of legal principles must in such a work be slight. Such readjustment must largely be based on the criticism of individual writers who by the very nature of their task enjoy a greater freedom of opinion. This is true, even though the work of the Institute be in part done by persons like Mechem and Williston, who have brought about readjustments through their individual writings.

For the advancement of the law and its adaptation to present needs, we must supplement the work of the American Law Institute by cooperative effort directed to the investigation of the facts regarding our legal institutions. This is not merely the task of the lawyer and the law teacher. It is the task of society to build constructive progress upon what the American Law Institute finds now to be the law.

We know too little of how legal institutions are actually working today. In the field of criminal law there has been some constructive investigation in Cleveland, in Memphis, in Missouri and in Georga. Investigations of rural justice and of justice in large cities are now in progress. But justice is a single problem and is administered by a single institution. We cannot properly consider criminal apart from civil justice or rural justice apart from justice in cities, or the administration of justice apart from the rules administered. In all of these fields there are common problems of judicial administration, promptness of trial, appeals, and of adjusting the law to new conditions. The automobile has largely destroyed earlier distinctions between urban and rural conditions. The defects in criminal justice are more spectacular and for this reason attract more attention, but they are no more serious than the defects in civil justice. The two are so closely related that the effort to deal with them separately results in wasted effort in both fields. Much would be added to our knowledge by a careful appraisal of all the law and of its administration in a single state. Such a complete investigation has recently been suggested in Illinois, though its accomplishment is still in doubt. Without a comprehensive investigation of this character, programs of improvement are necessarily incomplete and to a large extent ineffective. The recent report of the Massachusetts judicial council shows both the need and the possibilities, though the whole task cannot be assumed by an official body.

We have here the opportunity to re-establish the former close relations of lawyer, judge and law teacher. The teacher now has the greater opportunity to write, but he must know more of the facts in order to write understandingly. The specialization of teaching means that the teacher can have little opportunity for practice, either before he begins to teach or while he is teaching. We can re-establish the relation between practice and teaching through legal research—not a research into the cases alone but into the facts as well. Such research should be directed, not by the teacher alone, but by the teacher in co-operation with those who of necessity have closer knowledge of the daily facts of our legal life.

Improved methods of law school teaching have brought progress, but at the same time they have severed teaching from practice. The way is now open for some law school to take the lead in the re-establishment of the relationship between the law that is taught and the law in daily use. This can best be accomplished through an organization for the purpose of legal investigation. And through such investigation we should attempt an appraisal of the law and its administration.

FEDERAL EMPLOYERS' LIABILITY ACT—III*

By George Allan Smith
Of the San Francisco, Cal., Bar

Assumption of Risk. 1. Violation of Safety Acts

SECTION 4 of the Federal Employer's Liability Act provides that in all actions brought against the railroad under it for negligent injury, the "employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury."

"By the phrase 'any statute enacted for the safety of the employees' Congress evidently intended Federal statutes, such as the Safety Appliance Acts, for it is not to be conceived that, in enacting a general law for establishing, and enforcing the responsibilities of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer." Seaboard A. L. R. Co. vs. Horton, 233 U. S. 492.

The language of the excepting clause is, "any statute enacted for the safety of employees." A statute enacted for the safety of the traveling public would not be within the exception, unless it could be fairly construed to have also contemplated the safety of employees.

Although the Safety Acts are of an insurable character, and fix an absolute responsibility on the carrier, irrespective of the question of negligence, the Supreme Court has given to the Safety Appliance Acts a broad construction so as to embrace practically all train men who are injured as a proximate result of the insufficiency of the prescribed appliances.

In the early case of St. Louis & S. F. R. Co. vs. Conarty Admr., 238 U. S. 243, there are some general expressions pointing to a more narrow construction of these Acts. In that case the deceased was standing on the running board of a switch engine. It ran into a car standing on the main track, and he was crushed between the tender and the car. Had the car coupler and draw bar been in place he would not have been injured, for they would have kept an open space of possibly a foot or more between the tender and the car when they came together. It was this space the employee was relying upon, or he would have jumped from the running board before the collision. The court in reversing a judgment for the employee said: "The only negligence urged in the complaint was of a failure to have the car, at the end struck by the engine, equipped with an automatic coupler and draw bar of standard heighth, as required by the Safety Appliance Acts. . . . The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers, and draw bars of standard heighth; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be . . . that the collision was proximately attributable to a violation of these provisions, but only that had they been complied with, it would not have resulted in injury to the deceased. . . . Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. . . . On the contrary they affirmatively show that a principal purpose in their enactment, was to obviate the necessity for men going between the ends of the cars. . . . We are of the opinion that deceased, who was not endeavoring to couple or uncouple the car, or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and draw-bar operated as a breach of any duty imposed for his benefit."

The case of Lang vs. New York C. R. Co. 255 U. S. 455 is quite similar to the Conarty case. A car with a defective coupler was standing on a side track. A string of cars was "kicked" onto that track. The brakeman who was standing on the rear end of the "kicked" cars to brake them so they would be stopped before coming in contact with the defective car, did not succeed in doing so. He was crushed between the end of the car he was on and the defective car. If the defective car had been equipped with the statutary coupler and draw-bar they would have protruded sufficiently to have maintained a clearance space of more than a foot between the ends of the colliding cars. The court held that the brakeman was not entitled to recover because of the carrier's failure to have the defective car properly equipped, because the collision was not induced or proximately contributed to thereby. It said: "It was the immediate duty of Lang (the injured brakeman) to stop the colliding car, and to set the brakes upon it so as not to come in contact with the crippled car. . . . That duty he failed to perform, and if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with draw-bar and coupler, we answer as the Court of Appeals answered, 'Still the collision was not the proximate result of the defect', or in other words . . . 'the collision cannot . . . be attributed to a violation of the provisions of the law, but only that had they been complied with, it (collision) would not have resulted in injury to the deceased'." Justice Clarke, with whom Justice Day concurred, wrote a dissenting opinion. He contended for a broader construction of the Act. He argued that the limitation of the Acts stated in the Conarty case had

*As Construed by the U. S. Supreme Court. This is the third of a series of brief articles on this subject by Mr. Smith. The fourth and concluding article of the series will appear in the December issue.

been disapproved in the later cases of Louisville vs. Layton 243 U. S. 617, and Minneapolis & St. L. R. Co. vs. Gotschall 244 U. S. 66. His argument was based not so much on the actual facts presented in the Lang and Gotschall cases, but upon some broad general language in the opinions of those cases.

In the Layton case 243 U. S. 617, a brakeman was standing on top of a string of cars to which an engine was about to couple. On impact it failed to make the coupling, and the cars were kicked along the track with such force that the brakeman was injured. The faulty coupler was the immediate and proximate cause of the accident, and a recovery was sustained. The railroad company contended that irrespective of the fact that the faulty coupler was the proximate cause of the accident, the provisions of the Safety Appliance Act, as to automatic couplers, were only intended for the benefit of employees when attempting to couple, or uncouple cars. In declining to so limit the benefits of the Act the court said: "This claim is wholly based upon the expression 'without the necessity of men going between the ends of the cars,' following the automatic coupler requirement. And it is urged in argument that this case is ruled by St. Louis vs. Conarty 238 U. S. 243. In that case, however, it was not claimed that the collision resulting in the injury complained of was proximately attributable to a violation of the Safety Appliance Acts. . . . While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers, was the great number of deaths and injuries caused to employees who were compelled to go between cars to couple and uncouple them, yet these laws as written, are by no means confined in their terms, to the protection of employees only while so engaged. The language of the Acts, and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law, springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in, or the work he may be doing at the moment he is injured. This effect can be given to the Acts, and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of the injury to them when engaged in the discharge of duty."

In the Gotschall case 244 U. S. 66, the brakeman was walking along the top of the cars, when, due to a faulty coupler, the train separated and he was injured. The defective coupler was the proximate cause of the separation of the train, and a judgment for the employee was sustained.

In the case of Davis vs. Wolfe 263 U. S. 239, a conductor in the course of duty was clinging to a ladder on the side of the car. One of the grab irons, required by the Safety Act, and on which he was holding, was insecurely fastened, and because thereof he fell from the car. A recovery was sustained. The defective condition of the grab iron was manifestly the proximate cause of the accident. In reviewing the previous cases the court said: "The rule clearly deducible from these four cases is that, on the one hand an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation, in which the accident, otherwise caused, results in . . . injury: And, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

The latest case reaffirming the doctrine of the previous cases is that of Chicago G. W. Ry. Co. vs. Schandel 267 U. S. 287. The employee was injured while between cars endeavoring to detach a car with a defective coupler from the train.

In some of the cases the court uses the phrase "causal relation" instead of "proximate cause."

In the Wilson case 242 U. S. 295, a conductor in violation of the Hours of Service Act, was kept on duty in excess of sixteen hours; then given ten hours off, and again put on duty; whereupon he was injured. Because of fatigue he was unable to protect himself in the work he was doing. In affirming a judgment for the employee the court said: "There was evidence that the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours; and that as a physical fact it was far from impossible that the fatigue should have been a cause approximately contributing to all that happened. If so, then by the Employer's Liability Act, sections 3 and 4, questions of negligence and assumption of risk disappear."

In the McWhirter case, 229 U. S. 265, the causal relation was not present. A flagman kept on duty more than sixteen hours, stumbled and fell in front of his engine, while running along the track to throw a switch. No exhaustion, or other impaired physical condition, due to the long hours of work, was shown, and a recovery was denied.

The same is true of the Swearingen case, 239 U. S. 339. A fireman, on duty more than sixteen hours, fell off the pilot while oiling the engine. The court in reversing a judgment for the injured employee said: "The Act only relieves from assumption of risk when the breach of the Safety law contributes to the injury."

The violation of a Safety Act need not be the sole or principal cause of the injury. It is sufficient if it proximately contributed to it. Thus in the Campbell case, 241 U. S. 497, an engineer, contrary to orders, left the station and started west on a single track before the east bound train arrived. When he saw the east bound train approaching, he could have stopped in time, had the brakes been in good order, but they were not; they did not hold, and he was injured in the ensuing collision. The court in sustaining a judgment for the plaintiff said: "Where . . . plaintiff's contributary negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, it is plain that the Employer's Liability Act requires the former to be disregarded."

Many of the cases, involving a violation of the Safety Acts, present contributary negligence instead of assumption of risk. But the excepting language of the Act is the same as to both; so the contributary negligence cases are equally applicable to those involving assumption of risk. The follow-

ing other cases, involving a violation of the Safety Acts, are given in their chronological order:

A switchman between cars examining a faulty coupling was injured. The carrier claimed that the employee negligently signalled the engineer to come ahead, and that this, and not the carrier's failure to have the couplers in good order, was the cause of the injury. This plea was not allowed. The court said: "The case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railroad company to comply with the Safety Appliance Act, and by the contributary negligence of the switchman. In that contingency the statute abolished the defense of contributary negligence; not only as a bar to a recovery, but for all purposes."

A brakeman on top of the cars was injured when the car he was on was separated from the train because of a failure to have standard height draws bars on the car, which would have prevented the separation. He knew of this condition, but the statute relieved him from assumption of the risk incident thereto. Southern vs. Crockett, 234 U. S. 725.

A brakeman was injured while negligently between the cars endeavoring to uncouple a defective coupler. As the Safety Act governed the case, the fact that the plaintiff's conduct contributed to the result was not a defense. Great Northern vs. Otos, 239 U. S. 349.

In the Ribsby case, 241 U. S. 31, a brakeman fell and was injured because of a defective hand hold. In affirming a judgment for the plaintiff the court said: "Of course the employee's knowledge (of the defective hand hold) does not bar his suit, because by section 8 of the Act of 1893 (Safety Appliance Act, the provision of which as to the elimination of assumption of risk is similar to that of the Employer's Liability Act) an employee injured by any car in use contrary to the provisions of the Act is not deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge."

In the Parker case, 242 U. S. 56, the plaintiff was injured while attempting to adjust a faulty coupler. A recovery was sustained, for "if the road failed to furnish couplers as required by the statute, nothing else needs to be considered."

A brakeman was injured because of the absence of hand holds. The carrier contended it had supplied another device just as good. The court said, that the carrier must furnish hand holds as required by the statute; that something else it thought just as good would not answer the statutory requirement. St. Joseph vs. Moore, 243 U. S. 572.

In the Huxoll case, 245 U. S. 535, an employee negligently walking between the rails was struck by the tender of a backing engine, and rolled under the engine. After striking him the engine ran, possibly, 135 feet, after the engineer was notified he had struck a man. If the brakes on the driving wheels had been in good order, as required by the Safety Appliance Act, the engine could have been stopped in from 10 to 40 feet, and possibly avoided fatal injuries. The jury found that the faulty condition of the brakes, as well as the employee's negligence was a contributing cause of the fatal injury, and therefore contributary negligence was not even a partial defense.

An engineer was killed by the explosion of a locomotive boiler, which was not safe for use, as required. The employee did not assume the risk even if he knew of the dangerous condition. And the fact that the boiler had not been found insufficient by the Federal Boiler Inspector did not relieve the company of its statutory duty to have safe boilers in its engines. Great Northern vs. Donaldson, 246 U. S. 121.

Contributions

The contributions and letters in the JOURNAL are signed with the names or initials of their writers, and the Board of Editors assumes no responsibility for the opinions contained therein beyond expressing the view, by the fact of publication, that the subjects they treat of are worthy of the attention of the profession.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912

Of American Bar Association Journal, published monthly at Chicago, Illinois, for October 1, 1926.

State of Illinois } ss.
County of Cook }

Before me, a notary public in and for the State and county aforesaid, personally appeared Joseph R. Taylor, who, having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association Journal, Wm. P. MacCracken, Sec., Chicago, Ill.

Editor-in-Chief, Edgar B. Tolman, 30 N. LaSalle St., Chicago, Ill.

Managing Editor, Joseph R. Taylor, 209 S. LaSalle St., Chicago, Ill.

Business Manager, Joseph R. Taylor, 209 S. LaSalle St., Chicago, Ill.

2. That the owner is: American Bar Association, Charles S. Whitman, President, 120 Broadway, New York City; William P. MacCracken, Sec., 209 S. LaSalle St., Chicago, Ill.; Edward Kaestner, Acting Treasurer, 78 Chapel St., Albany, N. Y.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

JOSEPH R. TAYLOR.
Business Manager.

Sworn to and subscribed before me this 27th day of September, 1926.

[SEAL] MARY A. KING.

(My commission expires January 5, 1927.)

COMMISSIONERS ON UNIFORM STATE LAWS

Annual Meeting of Conference at Denver Was One of the Most Fruitful Sessions Ever Held by That Body—Bills Completed and Approved by American Bar Association for Presentation to State Legislators — Uniform Motor Vehicle Code Most Important of These Measures

By George G. Bogert

Secretary, Conference of Commissioners on Uniform State Laws

THE 36th Annual Conference of the National Conference of Commissioners on Uniform State Laws at Denver, July 6-12, 1926, was one of the most fruitful sessions ever held by that body. No less than eight bills on which years of work had been spent came to final consideration and were approved. In each case these proposed laws were approved by the American Bar Association, following the action of the Conference.

Undoubtedly the most important of these new proposed Uniform Acts is the Uniform Motor Vehicle Code. For many years the Conference had a committee on the regulation of the use of highways by vehicles, but not until 1924 at Philadelphia was substantial progress in the drafting of an act made. At that meeting a preliminary draft of a comprehensive statute was presented and discussed.

In November, 1924, Secretary of Commerce Hoover, acting entirely independently, called the First National Conference on Street and Highway Safety. He was moved to it by the increasing congestion of streets and highways and the appalling number of deaths and injuries occasioned by the automobile. This and the subsequent conference held under the auspices of the Department were supported by the American Automobile Association, American Electric Railway Association, American Mutual Alliance, American Railway Association, Chamber of Commerce of the United States, National Association of Taxicab Owners, National Automobile Chamber of Commerce, National Bureau of Casualty and Surety Underwriters, National Research Council, and National Safety Council, and representatives of these and other organizations participated in the conferences.

During the winter of 1924-1925, through the suggestion of the Hon. Charles E. Hughes, then president of the American Bar Association, the Conference on Uniform State Laws was brought into cooperation with the Department of Commerce, and representatives of the Conference thereafter have worked hand in hand with the Department and the National Conference on Street and Highway Safety. The Uniform Motor Vehicle Code is thus the joint product of these three bodies and their numerous skilled legal and technical experts. Rarely has a Uniform Act had such careful preparation. Representing the Conference in this matter and bearing the brunt of the labor have been Hon. Nathan William MacChesney of Chicago, Chairman of the Public Law Section, Gurney E. Newlin, Esq., of Los Angeles, Chairman of the Committee, and J. Allen Davis, Esq., of Los Angeles, draftsman.

The Code is divided into four parts—the Uniform Motor Vehicle Registration Act, the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, the Uniform Motor Vehicle Operators' and Chauffeurs' License Act, and the Uniform Act Regulating the Operation of Vehicles. This separation enables a state to adopt one or more of the acts less than the entire code, if local conditions make it impossible to secure passage of the whole code.

The Motor Vehicle Registration Act contains what are believed to be the best considered provisions regarding the establishment of a state motor vehicle department, the method of registration of vehicles, the cancellation or refusal of registration, and criminal acts connected with registration. Drivers involved in serious accidents are required to make reports which are filed with the state department, and studied and analyzed there. Such reports are to be used in considering the suspension or revocation of drivers' licenses in states where the subsequently described Uniform Operators' and Chauffeurs' License Act is adopted. Registration of the vehicle is required before operation.

The Act contains important provisions regarding the duties and liabilities of owners who rent cars without drivers,—the so-called "drive yourself" operators. These are required, on the registration of cars, to satisfy the Department as to their financial responsibility for damages caused by the cars rented, within named limits. If the owners do not carry liability insurance for the benefit of those injured in body or property by the negligence of the bailees of the cars, the owners are rendered jointly and severally liable with the bailees for the damages.

After lengthy debate it was decided to insert in the Act a provision that registration of the vehicle should expire on transfer of the vehicle, and should not be good for a definite period regardless of change in ownership of the car. This section, making the registration card and plate "follow the owner," instead of following the car, was strongly approved by police officers and vehicle administrators as useful in tracing vehicles in case of crime or accident.

Non-residents (except operators of truck and bus lines and others conducting business regularly within the state) are allowed to operate on the strength of registration in their home states. The excepted classes named above require a local license, in addition to their home state licenses.

The second of these four acts is the Certificate of Title and Anti-theft Act, based on, but believed to be superior to, the acts of similar purpose now in effect in seven states. Its fundamental provisions are the issuance by the state department of a certifi-

cate of title for each car registered in the state; the transfer of this certificate on transfer of the vehicle; and the maintenance of a record of such certificates and transfers in the state office. This assimilates to a qualified extent the transfer of motor vehicles to conveyances of real property, where abstracts of title follow the land.

For further reduction of the theft of cars the Act requires reports of stolen and recovered machines, establishes a state licensing system for dealers in used cars, and penalizes criminally alteration of identifying marks and receiving or transferring stolen vehicles. The license fees received from dealers are applied toward the payment of the expenses of the department in carrying out this act.

The third of the motor vehicle acts is the Operators' and Chauffeurs' License Act. On this subject there is great contrariety of opinion among the states. In eight states no licenses are required, in seventeen licenses for chauffeurs only, and in nineteen licenses for both chauffeurs and other operators. The several organizations which framed this code felt that a model license act should be prepared and enacted everywhere if possible. Increasing congestion and frequency of accidents seem to require the surrender of some degree of individual liberty in order to set up this safeguard against incompetent drivers.

The license act is concerned with the detail of issuance, suspension and revocation of licenses, and with penalties for violation of its rules. Non-residents, not licensed as operators or chauffeurs in their home states, and operating more than thirty days in another state, must be licensed in the latter state. The minimum age for the licensee is set at sixteen for operators and eighteen for chauffeurs, but restrictions are placed upon the issuance of licenses to all minors. Persons shown to be unfit by reason of physical defects, bad habits, or past misconduct are to be excluded from receiving licenses.

Operators' licenses are to contain the signature of the licensee, and chauffeurs' permits the signature and photograph of the chauffeur. Courts are to report to the department convictions for violation of the vehicle laws. The department is required to revoke the license of the convicted driver in the more serious cases (for example, manslaughter and driving while intoxicated), and may suspend or revoke the license for minor offenses.

Owners permitting minors under eighteen to drive their cars, and signers of the license applications of such minors, are to be liable jointly and severally with such minors for the latters' negligence in driving. State, county, municipal and other public corporations are rendered liable for the negligence of their operators and chauffeurs.

The fourth of these acts is the Uniform Act Regulating the Operation of Vehicles. In general outline it contains rules of the road, provisions as to the size, weight, construction and equipment of vehicles, instructions as to traffic signs, and penalty sections.

Speed limits are fixed which are prima facie lawful. These vary from fifteen to thirty-five miles an hour, according to conditions. For example, twenty miles an hour is established as the maximum speed which is prima facie lawful in residential districts. This does not mean that driving more than twenty miles an hour is in all cases negligent, but places on the driver the burden of showing that it was not negligent. It does not signify that one driving less than twenty miles an hour through a residential district may not be guilty of careless driving, but merely establishes a presumption of due care which may be overcome by evidence on the part of one injured by such driver.

Certain particularly dangerous railway crossings and through highways may be designated by the state authorities as stop crossings for automobile traffic. A large number of approved and tested rules for operating vehicles are set forth in this act.

The sections on size and weight of vehicles and loads, tire equipment, brakes, horns, mirrors, windshield-wipers, muffler cut-outs, lights and signals are detailed. They reflect minute and expert study on the part of the United States Bureau of Standards and numerous engineers and manufacturers. The National Conference on Street and Highway Safety adopted the principle that a red light should indicate positive danger and that yellow should be a cautionary color, but in view of certain technical difficulties and the desirability of further study of the question, the Act leaves to each state the decision as to whether the rear and signal lights should be red or yellow.

The preparation and indorsement of this Code illustrate an interesting trend in the work of the Conference. The Department of Commerce has only recently undertaken to aid in the preparation of state legislation. Having made a start with the Vehicle Code, it is continuing its work in cooperation with the Conference by aiding in preparing a proposed model mechanics' lien act. Thus, the federal government is beginning to place its great influence back of uniform state laws.

Another act completed and approved at the Conference at Denver was the Chattel Mortgage Act, which had been in course of preparation for four years. A summary of its main features, prepared by its draftsman, Professor Llewellyn of the Columbia Law School, is as follows:

1. Elimination of all possible formalities which might burden business, and full provisions for curative action when defects in form occur.
2. Protection of purchasers without notice, as against an unfiled mortgage.
3. Protection of creditors against an unfiled mortgage limited in general to lien creditors without notice; but general representatives of the creditors of an insolvent given protection regardless of notice.
4. Protection of mortgagee as far as filing can reasonably be expected to give notice, but no further, wherever the risk involved is the mortgagor's honesty. And in general the draft proceeds on the basis that *the mortgagor's honesty is a credit risk which is undertaken by the mortgagee.*
5. Simple and elastic foreclosure.
6. Liberal provisions on redemption and waiver of default.
7. Inclusion under the Act of all transactions which are in substance mortgages and under which permanent possession remains in the borrower.
8. Exclusion from the Act of transactions involving possession in the creditor, and which are in function and substance pledges.
9. Putting a mortgage and trust deed on the same footing.
10. Validating a mortgage on a stock in trade.
11. Validating and regulating a mortgage on book accounts, including a floating charge thereon.
12. Validating and regulating a mortgage to cover future advances, including a revolving indebtedness.
13. Regulating the conflicting rights of mortgagee and lienors relying on the mortgagor's possession.
14. Regulating the disposition of insurance.
15. Permitting either mortgagor or mortgagee to recover

for tortious injury to the goods, holding the proceeds for joint account.

16. Subjecting the interest of both mortgagor and mortgagee to alienation and to levy.

17. Requirement of filing, in general, both where the goods are and at the residence of the mortgagor, where investigation into his credit standing normally occurs.

18. Specially adapted provisions for automobiles, fixtures, book accounts and the property of public utilities.

19. Distinguishing in certain cases between a mortgage given merely as additional security for an old debt originally unsecured, and one given for a new advance which increases the mortgagor's estate.

20. Regulation of contracts to mortgage and defective mortgages.

21. Special provision for the mortgage of a building or plant with its equipment; and for long term mortgages by a business corporation.

22. Giving a mortgagee having notice of intended removal of the goods ten days within which to file, with retroactive validity at the new situs.

23. Defeating a mortgagee's interest six months after removal, in favor of lien creditors and purchasers without notice, even though he has not consented to removal.

To sum up: many transactions are validated of which there is business need, but which today are open to the chattel mortgage only in a minority of states; special cases are specially covered; formal and administrative provisions are made as simple and direct as possible; and the balance between the conflicting interests of mortgagor, mortgagee and third parties is worked out in the light of the best information we have been able to obtain on business practice and business needs, without unduly preferring any party—the central theory being that the mortgagee must be protected wherever feasible, but that he must bear the credit risk of his mortgagor's dishonesty, when no feasible method appears of giving the public notice of his rights."

The Uniform Criminal Extradition Act, which was approved at Denver, has been in process of preparation since 1922. Henry Upson Sims, Esq., of Birmingham, Ala., has been its draftsman. He has founded his work on the most satisfactory and workable provisions in existing state statutes and on the valuable treatise on Interstate Rendition by James A. Scott. Section 2 of Article VI of the Constitution of the United States places on the states the duty of securing interstate rendition of criminals. Congress, acting under this authorization, has made partial provision for extradition.[1] But much of the field is left open for state legislation and decision. There have been various and conflicting rules propounded by the states. This new Act is an attempt to simplify and unify the state law.

In thirty-one sections the Act deals with the situations arising both from the point of view of the demanding state and the state upon which the requisition is made. The form of the demand, the investigation, arrest of the party sought, his rights to habeas corpus and bail, and similar matters are treated. A state may, on the principle of interstate comity, surrender one charged with having committed an act within its borders which has resulted in the commission of a crime in another state. Persons extradited have exemption from civil process in actions arising out of the same facts, but are subject to later prosecution for other crimes than that for which extradited.

The act has been approved by the National Association of Attorneys General.

The Uniform Firearms Act, approved at the Denver meeting, is the subject of another article in the Journal.

Lastly, the Uniform Federal Tax Lien Registration Act, was approved by the Conference. It is designed to give the states a model law to secure the filing and discharge of federal tax liens. At present these liens are filed in the offices of the clerks of the United States District Courts. This makes the search of titles unnecessarily difficult. An Act of Congress of March 4, 1913, has authorized the states to provide filing systems and if such filing systems are established, the federal act makes the government tax lien invalid until filing, as against mortgagees, purchasers and judgment creditors of the tax lienee. In a simple bill of eight sections the Uniform Act, drawn by the Hon. W. H. Washington, of Nashville, Tenn., provides for the filing of notices of federal tax liens and their discharges in the county real property record offices. It is believed that this Act will be of great value to all interested in real property law practice.

The Conference made progress with the proposed Uniform Public Utilities Act, approving the concept of the Indeterminate Permit and directing the committee to frame provisions regarding the regulation of the issue of public utility securities. This Act will probably be completed in 1927.

The Conference also reconsidered its action, taken at Detroit in 1925, in disapproving the Uniform Real Property Mortgage Act and discharging its committee from the consideration of that subject. The Act of 1925, the result of several years of labor, was sent to a new committee of the Conference for study and report at the 1927 meeting.

1. Act of 1793; now Secs. 5278-9, R. S. 1875.

"Wrapping the Flag" Around Commercial Products

The Bureau of Foreign and Domestic Commerce has just issued a pamphlet on "Commercial Use of National Flags and Public Insignia," prepared by Bernard A. Kosicki, of the Division of Commercial Laws. It gives the legislative history of Federal and State Laws and contains the text of all the State Laws at present in effect. Curiously enough, although various bills have been presented, Congress "has established no regulations as to the use of the flag except with respect to the Federal registration of trade-marks. One of the principal objections to a Federal enactment expressed in the early consideration of the matter was that many trade-marks had been registered in the United States Patent Office which contained representations of the United States flag, and the proposed measure would disturb rights already acquired to those marks. In the trade-mark act of February 20, 1905, however, Congress provided against further registration of trade-marks containing the national colors." At the present time, the pamphlet adds, "every state in the United States, with the exception of Kentucky and Virginia, has a law prohibiting the misuse of the national flag, colors, standards, etc. The same provisions extend in most cases to the flag or insignia of a State; but the State laws do not control the abuse of foreign flags or national emblems within the State. . . . The State acts are not uniform either as to the definition of the offense or penalties. An effort has been made by the commissioners on Uniform State Laws to urge the adoption of a uniform measure by the various States. A model act was adopted at the twenty-fifth annual meeting of the Conference of Commissioners on Uniform State Laws and recommended to the States. In 1918 the proposed uniform law was redrafted by the national conference and submitted for acceptance to the States. This measure has been adopted by Arizona, Louisiana, Maine, Maryland, Michigan, South Dakota, Tennessee, Washington and Wisconsin."

FEDERAL TAXATION—ITS RELATION TO PROSPERITY IN PEACE AND SUCCESS IN WAR

By Clarence N. Goodwin
Of the Chicago and Washington Bars

WHEN the defensive strength of the United States is tested, a prime factor will be its ability to gather the maximum of revenue with the minimum disturbance of commerce and industry—a problem of preparedness not to be left to the hour of conflict. Likewise as a scientific revenue system is a matter of the first importance in peace, but particularly when business conditions are at their worst, the working out of such a system ought not to await a business and industrial crisis.

In peace and war there is insistent need of a well balanced, clear and certain method of federal taxation justly distributing the burden in such a manner as to be as little of an impediment to business and industrial activities as possible. Clearness and lack of all uncertainty is a prerequisite, but over 14,000 cases pending before the United States Board of Tax Appeals with the number growing daily,[1] and a similarly increasing number of tax cases pending in the federal courts indicates that progress in that direction is not being made.

It is, therefore, the purpose of this article to analyze the situation, to determine, if possible, the impediments in the way and to submit suggestions as to the remedy.

There are, of course, three factors in the obtaining of revenue. The legislature which passes the revenue statutes, the executive department which in determining and collecting the taxes authorized actually puts them in force and the judiciary which must in the end construe and interpret them. This last function is of vital importance for absolute certainty of meaning is necessary. The authority for final definition must be lodged somewhere and in our Government it is properly vested in the judiciary.

An immediate difficulty, however, is found in the fact that the initial construction of revenue laws must be made by the Executive and may in the end be at variance with the construction placed upon them by the branch of the Government which has final authority to make the binding decision, but this difficulty is greatly minimized by the fact that the Judiciary has during the last one hundred and fifty years laid down plain, simple and easily understood maxims for such interpretation. It has, for example, repeatedly stated that in such construction every doubt is to be resolved in favor of the taxpayer and the language of such statutes restrained within their plain and undoubtful scope. Revenue is a grant to the Government by the citizen through his representatives and the statute making it must like all similar grants be no broader in effect that the clear meaning of its words imperatively demands.

It is clear, therefore, that while the Executive Department must make the initial ruling, its responsibility is limited to an application of the principles of construction already laid down by the Judiciary and that such a course ought not to result in any great degree of conflict between the initial and final rulings.

With such a plain path marked out, how is the endless flood of tax cases, largely concerned with the meaning and application of the statutes, to be explained? Does it indicate that the Treasury Department has to some large degree failed to apply the rules which the Judiciary has made controlling? The repeated and continuing reversals of Treasury Department rulings would seem to support the inference that it has, for while a nice balancing of questions of doubt in an attempt to resolve them on the side of the greater probability must in many cases result in error, an inflexible rule requiring that doubt shall be resolved in favor of one view and against another leaves the field of unavoidable error extremely limited. There is, in fact, evidence in the situation, that the tendency of current treasury decisions is to resolve doubts in favor of the greater revenue and against the interests of the individual taxpayer—an entire reversal of the legal process.[2]

The question instantly arises as to why such a course is pursued. It must be said at once that it is obviously from excellent but mistaken motives, for apparently it is thought that officials employed by the Government *should* attempt to safeguard its financial interests and as a matter of caution decide every case on what they conceive to be the safe side, viz: in the interest of the larger revenue. This is, of course, a natural view but admittedly counter to the law, for there can be no duty except that of the painstaking application of the rules laid down by the properly constituted authority. The view also fails to consider the fact that as all the property of the country, capital as well as income, is subject to the federal taxing power which within constitutional restrictions is illimitable to the inclusion of the power to destroy, the Government can have no interest in the question of whether an interpretation produces a smaller or larger revenue. As deficiencies in

1. Up to October 11, 1926, twenty thousand five hundred and four petitions had been presented to the Board, while six thousand two hundred and seven had been disposed of. A leading article in the National Income Tax Magazine for October stated that of the fifty-five hundred cases disposed of prior to August 1, 1926, approximately seventeen hundred were formal decisions and the balance dismissals on jurisdictional grounds and that before any decided decrease in the number of petitions filed may be expected the Board would find itself twenty-five thousand cases behind.

2. It is not suggested that the tendency, believed to exist, accounts altogether for the accumulating mass of tax litigation. There are cases clearly debatable even when the judicial canons of construction are given their fullest application, and cases where the position of the taxpayer is unsound or extreme. But it is felt that there is an even larger class of cases where in their anxiety to uphold what are supposed to be the interests of the Government, Treasury Department Officials hesitate to take the responsibility for making an adverse ruling or finding, and that this tendency becomes greatly exaggerated among the subordinate officials or employees who naturally desire to avoid the possibility of criticism. If the tendency of the Department is as suggested, the inevitable effort of subordinate officials to protect themselves by a margin of safety and the unfortunate results of such a situation can well be understood.

revenue must be supplied by increased, and surpluses limited by decreased, levies, the matter of interpretation is a question of justice among taxpayers in which the Government has no interest beyond that of seeing that the lawfully promulgated rules of construction are properly applied. An evidence of this is the fact that while the present revenue law was intended to confine our revenues to our governmental needs, it is in fact producing a surplus of some hundred millions which must be eliminated by further reductions in tax rates or by rebates. It must also be remembered that the citizen is himself a part of a free and representative government and its officials must, therefore, be as tender of the rights of those who contribute the revenues as of those who spend them.

It may also be noted that to resolve a doubtful question in the interest of revenue must in the majority of cases, if not in all, result in an ultimate reversal usually after a period of years, thus postponing a re-statement of the legislative intention during the interim, where the intention of the act's sponsors actually went beyond its legal intent as restrained by the canons of interpretation.

This may be illustrated by the case of the Estate Tax Act of 1916 which was construed by the Treasury Department to include gifts in contemplation of and to take effect at or after death no matter when made—a ruling which was dryly and, in a way, witheringly commented upon by the learned and venerable Supreme Court Justice in an opinion construing the Act handed down nearly six years after its passage.[3]

There is another potent reason for the interpretation of a revenue statute strictly in accord with the maxims protective of the taxpayer in that a construction giving it a drastic or harsh operation may result in such individual hardship as to make it obnoxious to the public and thus destroy the availability of a constitutional source of national revenue. Obviously it is of the highest importance that, for purposes of national defense at least, the usefulness of every source of federal revenue shall be preserved even though it be a means which ought not to be resorted to except in the case of great emergency. An instance in point is found in the excess profits tax provisions which produced a net aggregate of substantially seven billion dollars—the largest amount drawn from a single source and a helpful means of winning the great war.

These provisions were intended to tax in an increasing degree the profits of corporations over and beyond a normal and proper return on the capital employed, especially to the extent that such excess represented profiteering or excessive profits due to war conditions. The difficult problem was that of laying down hard and fast rules which would satisfactorily determine the actual capital employed and the Act of 1917 in which this was attempted was so harsh and unjust when universally applied that it was only made tolerable and workable through an enormous broadening of the relief section through Treasury Department regulations. In connection with the Act of 1918 Congress was, therefore, asked to change its method and determine the invested capital which was the governing factor in fixing the rate of tax by an appraisal of the capital assets of the taxpayer. This was deemed impracticable if not impossible and the committees of Congress arrived at the conclusion that the method set forth in the Act of 1917 worked well in "a large majority of cases" and that "the remaining cases in which it works injustice" could and should be taken care of by adequate relief provisions. These exceptional cases were enumerated in detail in the bills passed by the two Houses of Congress, the House bill enumerating five, and the Senate ten specific classifications. For all these there was substituted a general statement providing for relief in all cases where capital or income was affected by abnormal conditions (with two exceptions noted) which as stated by the Committees gave relief "in more comprehensive terms." The Senate Committee declared that business was "apprehensive" about the operation of the law and that ample provision must be made to prevent hardship.

We have then in this instance not only the case of a revenue law which under the settled rules must be construed most favorably to the taxpayer but one with relief provisions which, under equally well settled maxims of interpretation, must be given broad and liberal construction to the end that the relief intended may be complete, and one accompanied by declarations in such wide terms as to embrace all cases of abnormal conditions, save only the two enumerated. It is also noted that the relief provision of the Act of 1917 which only applied to cases where the Secretary of the Treasury could not determine the invested capital had been broadened and enlarged by executive construction so as to cover all the cases of hardship afterwards enumerated in the Senate Bill, and that for five years following the passage of the Act of 1918 the Treasury Department continued to interpret the relief provisions referred to in a similar manner and with specific recognition of all the grounds of relief so enumerated.[4]

While this practical construction of the Act by the officials charged with its enforcement extending over a long period of time and acquiesced in by the public and strengthened by the passage of the Act of 1921 re-enacting the language of the Act of 1918 without change, constituted an interpretation of the Act binding alike upon the Government and the taxpayer, we find the Treasury Department in 1925 some six years after the passage of the Act, entering upon a new course of interpretation substantially nullifying nearly every ground of relief from the harshness and injustice resulting from rigid application of invested capital provisions to abnormally circumstanced cases and in effect setting aside the practical and binding interpretation just referred to.

The result is that now seven years after the enactment of the excess profits provisions of the Act of 1918 and four years after they have ceased to be in effect, we are just entering upon a struggle

3. In commenting on the Commissioner of Internal Revenue's ruling that the sole test of the application of the estate tax to the gift was "the date of the death of the decedent" Mr. Justice McKenna said "He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer." Schwab vs. Doyle, Collector, etc. 258 U. S. 529 at p. 536.

4. A question is now raised as to whether the broad interpretation placed upon the remedial provisions of Section 210 of the Revenue Act of 1917 can be sustained but in view of the fact that they were immediately so construed by those charged with their application in order to prevent the mischief sought to be avoided, without objection raised by anyone, and that this interpretation was embodied in the succeeding enactment on the same subject and continuously followed by the Department clearly puts the binding character of the construction beyond all question.

in the courts over their proper interpretation and application. This statement, however, ought not to be left without at least one illustration of the extent to which the Treasury Department has reversed its former interpretation. Among the cases in which experience under the Act of 1917 showed that the rigid invested capital provisions created the greatest hardship was that large class of conservatively capitalized corporations which had over a period of years built up a stable and profitable business through the merited reputation which their products had acquired and in general where there were "intangible assets of recognized or substantial value built up or developed by the taxpayer" which were excluded from the computation of statutory invested capital. These conditions were recognized by the Treasury Department from the first as a ground of relief and incorporated in the Senate Bill in the exact words just quoted.

Such intangibles were commonly and generally capitalized and often overcapitalized in the great era of recapitalization and re-organization which began as early as 1897 and extended to practically every species and kind of business throughout the country, consequently one compelling reason given by the Committees of Congress for the relief provisions was the heavy penalty which the Act placed on conservative financing and the corresponding premium on overcapitalization.

In spite, however, of the continuous recognition given the exclusion from invested capital of intangible assets of recognized or substantial value built up or developed by the taxpayer as a ground for relief in cases of hardship resulting therefrom, continuously and consistently from the time the Revenue Act of 1917 went into effect, the Treasury Department under date of August 2, 1926, rules that it refers only to such intangible assets as are built up or developed "as the result of substantial expenditures and not such as have been built up or developed gradually over a period of years," an entire reversal of the position of the Department for a period of nearly seven years at least. As modified by this belated decision the former rulings and the declaration of the Senate Bill would become entirely meaningless, for intangible assets built up or developed as the result of substantial expenditures cannot be excluded from invested capital if their amount can be determined, and if the amount of the expenditures cannot be determined, the case is covered by the provision which relates to the inability of the Commissioner to determine invested capital and not to the one which relates to abnormal conditions. It is enough, however, to say that the Treasury Department did continuously and consistently grant relief where such intangible assets had been built up and developed gradually over a period of years.

It is not the purpose of this article to attempt to enumerate the classes of cases in which the Treasury Department has denied relief, although such relief was obviously intended by the Act and had been consistently recognized theretofore, but rather to call attention to the specific instance stated and to point out that the continued narrowing of these ameliorating provisions of the Act must tend to make obnoxious and destroy the availability of a great constitutional source of national revenue proven most helpful in time of war.

It is suggested that the Government faces no present difficulty in obtaining from constitutional sources all the revenue necessary for its needs. Its real problem is to see that the measures providing for its necessities shall be clear and certain in their meaning, and just and equitable in their operation and causing as little individual hardship and as little impediment to business and industry as possible. This cannot be attained unless in their interpretation the executive department shall recognize to the fullest extent the maxims of construction and interpretation laid down by the judiciary; any other policy must continue the irritation, uncertainty, confusion and conflict which now prevail.

There are but two tenable views of the duty of the officers of the Government relative to tax matters; either they are charged with a duty to contend for the construction and application of a tax statute which will produce the largest revenue or with the duty of taking a totally detached point of view, disregarding the effect of their decisions on the amount of revenue and guided only by a purpose to give to the act the same interpretation and application which they would give it if they were sitting as judges.

It is the theory of this article that they are following the first view, but its contention that they are in law bound to follow the second. The first must continue to be a source of endless litigation and continuous conflict between the initial interpretation of an act by the executive and the decisive construction by the judicial department, while the latter view would of necessity avoid the major part of such litigation and conflicting interpretations.

As the attachment of the citizen to the Government depends largely on his feeling that it is just and fair in its dealings with him, sound public policy as well as fair dealing makes justice to the citizen the first duty of the Government and of those who have its administration in charge. It is to be remembered, also, that while the few may be able to battle in court for their legal rights, justice to the mass of the taxpayers can only be had at the hands of our administrative officers.

The Constitution in Louisiana Schools

Following is a copy of the act requiring the constitution to be taught in certain Louisiana schools, which was passed at the recent session of the legislature in that state and approved by the Governor on June 26, 1926:

AN ACT

To require the teaching of the Constitution of the United States in all educational institutions supported wholly or in part by public funds.

Section 1. Be it enacted by the Legislature of Louisiana, that in all schools, colleges and educational institutions, supported wholly or in part by the public funds of the State of Louisiana or any of its subdivisions, parish, district or municipality, there shall be given regular courses of instruction in the Constitution of the United States.

Section 2. Such instruction in the Constitution of the United States shall begin not later than the opening of the eighth grade and shall continue in the high school course and in courses in college, universities and all educational institutions referred to in Section One of this Act.

Section 3. The State Board of Education or the governing authority of such educational institution are charged with the duty of the enforcement of the provisions of this Act.

THE JUDICIAL SYSTEM OF SOVIET RUSSIA

Courts Under Czarist Régime—Immediate Effects of Revolution on Judicial System—Decree Establishing Present Organization of the Courts—Political Control—Denial of Force of Precedent—Qualifications of Judges

By Will Shafroth
*Of the Denver, Colorado, Bar**

RUSSIA today presents a greater contrast to the Russia of ten years ago than we will find anywhere in modern history. Material, social and political conditions have so changed as to be entirely unrecognizable by a person familiar with the old Russia. The laws of that country and the courts through which they are interpreted have probably changed fully as much as anything else. But this is not entirely apparent on their face. To understand present conditions in Russia, the first and foremost thing to realize is that nowhere in the world are theory and practice so far apart. This is true of communism itself. Its basic principle which has been expressed in the words "From each according to his ability, to each according to his need" is the most humane and Christlike doctrine imaginable, and yet in practice this theory has brought misery and poverty and untold suffering to millions. It is true of the political structure of the country. In theory it is a pure democracy of the proletariat, but in practice it is a dictatorship of an incredibly small minority. It is true of the communist programs for education, for the building of industry, and for many other things, but it is even more true in regard to the courts and laws of Russia.

In order fully to appreciate the change which has been wrought by the present legal system, it is necessary to know something of the courts and legal procedure under the czarist regime.

The organization of the courts was much simpler than our own since there was one unified judicial system. All judges were appointed by the crown and all served for life, or at least during good conduct. This applied to all judicial officers from the justice of the peace up to the members of the Senate, which was the highest court. Justices of the peace had jurisdiction of civil offenses involving not over 500 rubles ($250) and over criminal cases where the maximum punishment did not exceed two years imprisonment. From these courts there was one appeal only to a circuit court of appeal having jurisdiction only over these appeals. The next higher court was the district court in which three judges always sat en banc. This court had a separate division for criminal and civil offenses. Civil offenses were never tried to a jury. The jury in criminal cases was chosen from freeholders. The next higher court was the chamber of appeals, which had original jurisdiction in certain cases, but the main function of which was to hear new trials, in cases from the district court, when the case was tried de novo. The highest court in Russia was called the senate. It was a court of cassation where appeals of law from cases in the district court were tried and consisted of about forty judges and sat only in St. Petersburg. Each of its divisions consisted of three or more judges. This in general was the organization of courts under the czar.

With the Bolshevic revolution in November of 1917, this entire judicial system and the body of existing laws were swept away as though they were rooted up and carried off by a flood. At first there were only the revolutionary tribunals established by one of the first Soviet decrees, that of November 24, 1917 for "The struggle against counter revolutionists aiming to destroy the achievements of the revolution, against banditism, theft, graft, peculation, sabotage and all other evil doings of industrialists, traders and officials." They were principally defensive agencies and only secondarily courts of justice. Some time later the so-called People's Courts were established. These were tribunals which were presided over by workingmen from the factories, who were elected by the local soviets or assemblies and could be recalled by them. In the program of the Communist Party which was more vital at that time than the Constitution the following reference to the system of jurisprudence was found. This, like all official pronouncements was written to constitute propaganda, but nevertheless it shows the idea back of the establishment of these People's courts:

> Jurisprudence — Proletarian democracy, taking power into its own hands and finally abolishing the organs of domination of the bourgeoisie—the former courts of justice—has replaced the formula of bourgeois democracy, judges elected by the people, by the class watchword; the judges must be elected from the working masses and only by the working class.
>
> In order to induce the broad masses of the proletariat and the peasantry to take part in the administration of justice, a bench of jury-judges, sitting in rotation under the guidance of a permanent judge is introduced and various labor organizations and trade unions must impanel their delegates.
>
> The soviet government has replaced the former endless series of courts of justice with their various grades by a very simplified, uniform system of people's courts accessible to the population, and devoid of useless delay.
>
> The soviet government, abolishing all the laws of the overthrown governments, commissioned the judges elected by the soviets to carry out the will of the proletariat in compliance with its decrees, and, in cases of absence or incompleteness of decrees, to be guided by socialist conscience.

A third form of tribunal was the dreaded Cheresvechaika or Cheka for short. (The translation of the name means Extraordinary Commission,

*Paper read before the Law Club of Denver. The writer has had the background of actual experience in Russia, as he was in that country with the American Relief Administration from Sept., 1921 to May, 1923. He spent part of the time in the town of Samara, on the Volga, where he was in charge of the relief district of the State of Samara, in which, during the worst part of the famine, 1,400,000 adults and children were fed with American food.

and its powers were certainly nothing if not extraordinary) with branches in every city of considerable size and every province. It was in reality not a judicial body at all, but a secret police which investigated, arrested, tried, sentenced, and carried out its sentence absolutely independent of any other department of the government, with no right of appeal, and no responsibility to any one. Its unlimited power was feared, even by the officials of the government itself. The central authority of this system, the All-Russian Cheka has officially reported in the neighborhood of ten thousand executions during the period of the Red Terror, when the fear of counter-revolution was at its height, and it is impossible to estimate how many were executed by the various local branches.

During this period there were no trials by jury, but in the People's Court, there were as a rule three judges and the decision was given by the majority. These courts were very little used in civil matters up to the adoption of the New Economic Policy in the spring of 1921, as up to that time there were no property rights, and, therefore, almost no occasion for civil suits.

On December 1, 1921 there were 3,286 People's Courts in European Russia. Out of 149 judges in Moscow, 80 were Communists and 69 non-partisan, 21 of these had some sort of legal training, five had completed a college course of some kind, 20 had a high school education and 103, or over two-thirds, had a beginner's education or less. Out of 50 judges, 16 were factory workers, 18 clerks and office workers and 16 had miscellaneous occupations.

During this period a new system was established for the bar. An association of public prosecutors, an association of public defenders, and an association of solicitors in civil actions were established, elected by the executive committee of the local soviets and paid regular salaries. Counsel in criminal cases were assigned by the judge, and in civil cases the litigant had to apply to the association for counsel. Lawyers of the old "Bourgeois" government were not permitted to appear before the courts.

This was the foundation of the present legal system of Russia, and the Civil Code which was adopted in 1922 effective Jan. 1, 1923 was chiefly a codification of the different decrees dealing with the courts which had been issued since November of 1917, and a supplementing of them in order to make a fuller and clearer system of laws. Also various new laws such as those relating to contracts, partnerships and associations were included in the new code. But before taking up the decree establishing the present system of courts, it will be well to consider briefly the government which has promulgated these decrees.

Russia is now not a single state; it is a collection of autonomous governments and is officially known as the Union of Socialist Soviet Republics. This is constituted of the Russian Soviet Republic, the Ukraine, White Russia, Transcaucasia, Azerbaijan, Georgia and Armenia. Each of these Republics has its own system of courts consisting of People's Courts, Provincial Courts and a Supreme Court. A constitution was adopted by the Union on July 6, 1923 which deals with the relation of the Union to the separate governments and the powers of the Congress of Soviets of the Union and its Executive Committee, of the cabinet and the Supreme Court and a number of other miscellaneous matters. Theoretically these states are independent, but as a matter of fact the new constitution gives them no greater power than they had in the past. Little authority is possessed by the different states, and the constitution was not submitted to them individually for ratification, although they had representatives in the body which promulgated the decree establishing it. For our purposes, however, this document is not as interesting as the constitution of the Russian Socialist Federated Soviet Republic, as the government first established by the Bolshevics was called. That provides the skeleton of government, which is briefly as follows: Each village elects delegates to a provincial assembly or soviet, which is the Russian word for council; the provincial soviet elects delegates to a state soviet and the state soviet elects delegates to a national congress of soviets, containing perhaps 2,000 members and meeting once a year; the national assembly elects an executive committee which is still a relatively large body, about 400 members who meet three times a year. It is the presidium or governing committee of this body which is the supreme legislative, executive and administrative organ during the time when the Executive Committee is not in session. It is the Central Executive Committee which selects the members of the Council of People's Commissaries as the Russian cabinet is called, and the president of this council, who is in effect the president of Russia. This Council of People's Commissaries as well as the individual departments may issue decrees, but, if they deal with the political and economic life of the Union, they must be confirmed by the Executive Committee. Thus it is this committee which both establishes and controls the government of Russia, appoints the majority of the members of the Supreme Court, and has the right, in case of necessity to annul its decisions.

Theoretically then, this is representative government with indirect election of all the higher government officials. The catch, however, comes in the method of elections. In the first place the franchise is strictly limited to the proletariat. The following persons have not the right to vote: A. Persons employing the work of others with a view of deriving benefit therefrom. B. People living on a revenue which is not earned by their personal work. C. Tradesmen and commercial agents. D. Monks and priests of every religion.

Any other citizen of either sex, seventeen years old or more, has the right, but even among those who have the right to vote, there is no freedom of choice. There is no secret ballot, and all voting is by show of hands. The communists are in charge of the meetings, and generally their candidates are nominated, and then there is a vote on them. Although non-communists are in the majority, they usually do not dare vote against the communist candidates. In the early days of the government, to do so meant that the person so acting was opposed to the government, and counterrevolutionary in spirt, and very often people were imprisoned for long periods of time and deprived of everything they had for no greater offense than this. This cannot be said to be the case now, but in general it is not considered extremely healthy to start any vigorous opposition to communist policies or communist candidates. In the All-Russian Congress

there is a small percentage of representatives of the opposition, but there is no opposition party, and there is no chance that the communists will allow one to be established. Freedom of assemblage, though theoretically possible, is practically impossible because of control of means of organization and places of meeting. Freedom of speech and of political organization is not permitted by the constitution if it is considered as being against the good of the state. Freedom of the press is directly denied and every publication in Russia must pass the censor.

And so the real ruling force in Russia is neither the people as a whole, nor the working classes, but purely and simply the communist party which consists of less than one per cent of the population of the country. It is the Central Committee of the Party consisting of nine members which controls the Executive Committee, and which in reality chooses the Commissars and their president and determines all government policies. The state organizations also have their Central Committees of the Communist Party, but in the smaller villages there is often not a single Communist to be found with the exception of the chairman of the village committee, who is sent there to fill that position by the state committee. State governments are organized similarly to the national government and are controlled in the same manner.

The organization of the courts fits into this system of government very well. All former decrees in regard to the law courts were superseded by the decree of November 11, 1922 passed by the All-Russian Central Executive Committee to become effective January 1, 1923. This decree starts out with the regular Communist preamble in the following language:

PART I

1. GENERAL

1. In order to safeguard the gains of the proletarian revolution, and to protect the interests of the State and the rights of the laboring masses and their organizations, the following unified system of judicial institutions is hereby established for the whole territory of the R. S. F. S. R.

(a) People's courts, consisting of a permanent People's judge.

(b) People's courts, consisting of the permanent People's judge and two assessors.

(c) Provincial courts.

(d) The Supreme Court of the R. S. F. S. R. and its subordinate courts.

This outlines the backbone of the judicial system. In addition there are various special courts established including military tribunals, military transport tribunals, labor courts, land commissions and arbitration commissions attached to the Council of Labor and Defense, the jurisdiction of which is implied from their titles.

The People's Courts are the ones which form the foundation of the present court system, and they are established in every town of any size and in every county. They are similar to our Justice courts in jurisdiction and are presided over by one permanent people's judge, who is elected by the provincial executive committee for a term of one year; and beside him on the bench sit two people's assessors who are simply working citizens called to this duty six days a year in the same way that our citizens are called for jury service except that they are chosen from a picked list. A majority of these three decide the case, and though the opinion of the permanent judge has the most weight, the other two may overrule him. The People's judge can be dismissed at any time by the Executive Committee, if he is given a trial or brought up before a disciplinary board. The qualifications of the People's Judges are very simple and shed considerable light on the kind of justice which is dispensed in their courts; anyone who has not been convicted by a court of law, and who is qualified to vote and has had "not less than two years' experience of responsible political work in the workers' or peasants' public, industrial or party organizations or not less than three years' experience of practical work in a Soviet judicial institution in post not lower than examining magistrate" may be a People's judge. The People's assessors who sit with the judges are chosen 50% from industrial workers, 35% from villages and rural districts and 15% from local military units. In selecting the names to be put on this list of assessors the decree specifies that the work shop committees and other organizations which choose them shall proceed "taking into consideration their political development". Thus it is apparent that every effort has been made in the Code to make these courts an instrumentality of the working class against the bourgeoisie. Certain county committes can remove from the list of people's assessors any whom they consider not possessed of the necessary qualifications. A naïve paragraph of this part of the decree provides that the judge shall explain to the people's assessors their duties and shall secure from each a signed acknowledgement of such explanation "and a solemn promise to judge according to the dictates of his conscience". During their service the assessors are paid by their employers, the factory or the local executive committee which chose them.

The jurisdiction of the People's court covers civil cases involving sums less than 500 roubles in gold ($250) including estates, divorces, complaints against acts of notaries, etc., and criminal cases including breach of military duties, infringement of excise regulations, and violations of regulations set up to safeguard the people's health, social welfare and public order under the criminal code.

The provincial courts are set up along the same lines, and may be compared to our District Courts. They have jurisdiction over the province in which they are established and supervision of the minor courts in that jurisdiction. They control the work of the People's courts in their territory and see that they function as provided. They also hear appeals from them and in some cases private complaints against their decisions. They also have original jurisdiction in cases involving over 500 roubles in gold, in disputes with or between government enterprises, and causes against officials for abuse of their authority. This is the court to which companies must bring their grievances. It serves also as an organ for denationalization, settling questions concerning improper alienation of property, authors' literary rights, trade-marks and industrial inventions. It also has criminal jurisdiction in cases which are considered of more importance to the state.

The judges of this court must have had not less than two years experience as people's judges and their election by the State executive committee must be confirmed by the head of the State Department of Justice. The same system of People's As-

sessors is used in this court, with the proviso that the qualifications for this court include those required for the People's court and also not less than two years experience in work with some social or industrial organization of the government.

The Supreme Court of the Russian Socialist Federated Soviet Republic has jurisdiction over appeals from the provincial courts and original jurisdiction over cases of special state importance. It has also supervision over all the courts in the republic. Its members are appointed by the Presidium of the all Russian Central Executive Committee, and can be recalled or suspended by this committee. People's assessors also take part in the proceedings of this court, but here they are special assessors, appointed from among the higher officials of the government. In all, the court has 27 members divided in sections of Civil Appeal, Criminal Appeal, Judicial Division handling cases of original jurisdiction, Military Division and Military Transport Division, each of these consisting of five members, only three of whom sit at a time. In certain cases plenary sessions of the court are held where a majority of the members are present. This is generally only in cases where an authoritative interpretation of law on a question of judicial procedure has been put forward by one of the divisions of the court or by the attorney general or by the Presidium of the Central Executive Committee or in cases where an appeal has been taken from the decision of a division of the Supreme Court or other court on the recommendation of the All-Russian Executive Committee, or the Attorney General, or where the Chairman of any division of the Supreme Court, or the prosecuting attorney assigned to any division has asked for a review by the plenary session.

A still higher Federal Supreme Court of the Union of Socialist Soviet Republics, consisting of 11 judges, was established by a decree of November 23, 1923. This court has jurisdiction to try disputes between different republics, or cases involving members of the Central Executive Committee and members of the Cabinet and to give interpretations of laws on request. Its appellate jurisdiction is limited to cases where decisions of lower courts are incompatible with federal legislation.

But it is particularly in the field of procedure where we find the greatest difference between the courts of Russia and own own. A code of Soviet civil procedure went into effect on September 1, 1923, defining and providing various rules in regard to procedure in the courts. The chief point which is remarkable to us about the rules of procedure laid down there is the large part which the court takes in the conduct of a case. It is instructed to use all the means in its power in order to ascertain the real rights and relations of the parties to an action. The Court must question the parties in the defense of their rights and interests, so that ignorance of law and illiteracy can not be used to their disadvantage. The court has the option of awarding a larger amount to the successful party than he has prayed for. It determines the admission of evidence in accordance with its materiality. On its own initiative it may verify the proofs submitted by the parties, either by inspection out of court, examination of wrtten papers, calling of experts or the summoning of new witnesses. No oath or affirmation is required of the witness, but the statute of perjury is read to each one before he testifies. The statute of limitation is three years and is retroactive. Appeals may be taken over a decision of a trial court in two cases only, namely, error in law or a judgment clearly against the weight of evidence.

Each judge runs his own court largely according to his own ideas. It is expressly provided in the decree bringing into effect the Civil Code (Sec. 5) that "Interpretations extending the provisions of the Civil Code of the R. S. F. S. R. shall be permissible only in cases where the safe-guarding of the interests of the workers and peasants' government and of the working masses makes this necesary" and (Sec. 6) "Any interpretation of the provisions of the Code on the basis of the legislation of preceding governments or the practice of pre-revolutionary courts is prohibited." This practically does away with judicial precedents as there are no such things as printed reports of decided cases. Where the Code or existing decrees are not sufficiently definite, the judges must use their "revolutionary conscience". As this is as different in different judges as is the size of the chancellor's foot, decisions on the same facts before different courts have often been exactly opposite, which has tended to destroy any confidence the people may have had in the courts. Moreover this is due warrant, in any given case, for disregarding the pure justice of the matter, and bringing in class distinctions and considerations of proletarian origin, which figure very often in their decisions. The courts are thus allowed to be used as instruments of the government in the class conflict. The judges are provided with copies of the Civil and Criminal Codes and the various decrees, and in general show a reasonable familiarity with them. In the general run of cases, they show a desire to decide fairly, but there is considerable graft, and it is not considered by most people that a non-party litigant has a fair chance in a case against a communist.

As has been stated before there are no juries, and the judges are given a wide latitude in their decisions. Altho the criminal code which came into effect June 1, 1922, provides minimum punishments for all offenses which it defines, the judge may allot a less punishment whenever he so desires, provided only that he sets down in writing his reasons for so doing. In general whatever may be interpreted as counter-revolutionary acts may be punished by death. Outside of these "political crimes" the maximum punishment is ten years imprisonment. The minimum for premeditated murder when not done "from motives of self-interest or jealousy or from other base incentives" or unless there are other aggravating conditions, is three years; otherwise eight years. The teaching of religious doctrines to young children in private or public schools under the Code was punishable with compulsory labor for a period up to one year, while on the other hand the prevention of the performance of religious ceremonies in so far as they did not violate public order, and were not accompanied by infringements of the rights of citizens, might be punished by compulsory labor up to six months. In November of last year this law was amended to permit the study of religion "where it is necessary to confirmation." As this includes the Greek Ortho-

dox, Catholic and Lutheran churches, it practically repeals the former law on the subject. The judges are authorized to award compulsory labor without imprisonment; and banishment, or confiscation of all property are also within their power. At the time of the enactment of the criminal code no spiritous liquors of over fifteen per cent strength were permitted, and bootleggers of home brew in violation of this law were subject to a minimum imprisonment for three years with confiscation of all property. The legal percentage of alcohol has now been raised to forty in order to permit the government to resume the manufacture of vodka, which was a very large source of revenue to the Czarist monarchy. The minimum punishment for rape is slightly less than that of a bootlegger, namely, three years, without property confiscation, and the keeping of a disorderly house is punished with the same minimum imprisonment, and confiscation of property in whole or in part. Theft from a private person without the application of technical methods is punishable with compulsory labor for a period up to six months while if resorted to as a regular means of livelihood, two years solitary confinement is the minimum. Robbery, which the Code defines as "the open stealing of another person's property in the presence of the person who owns, enjoys or manages such property" when unaccompanied by violence is requited with a minimum of one year's imprisonment, while assault with intent to rob, by not less than three years imprisonment, and "if the court finds that the person who has committed such crime is socially dangerous in a special degree" he may be shot. The sale of worthless seeds with knowledge has a minimum punishment of two years imprisonment.

An examining magistrate is appointed for certain districts with the duties of an investigator, and to the District and Supreme courts is assigned a "prokuror" or public prosecutor with wide powers. The chief "prokuror" or attorney general may submit any decision of the Supreme court to the Executive Committee of the Union, for consideration, and they may reverse such decision, which gives the legislative branch of the government the final say over the judicial.

Although there are laws in existence in regard to personal liberty these are not always scrupulously enforced. Anyone who is arrested must be arraigned before an examining magistrate within three days, and if not tried within a week, must be given a written declaration showing the charges against him. He must be tried within a month. Apparently a prisoner has no redress if these provisions are violated and there is no such thing as a writ of habeas corpus by which they can be enforced.

The standing of foreigners in soviet courts is very doubtful. If their government has an agreement with the Union of Socialist Soviet Republics, their rights are governed by that agreement; if not, they are subject to the tender mercies of the Commissariat of Foreign Affairs which decides on their case in conjunction with the particular department their grievances may come under. I know personally of a case of an American, formerly a relief worker, who stayed in Russia after the termination of the famine relief work to go into business with some Communists. He invested a couple of thousand dollars in a lumber company, and his communist friends succeeded in getting a monopoly on the business in the particular town where they were working. In seven or eight months paper profits amounted to over five hundred per cent. About this time he received a notification from the political police at Moscow that it was necessary that he should leave the country at once, and he was given two weeks in which to get out. A visit to Moscow gave him no satisfaction. There was no court to which he could appeal, and if he stayed to try it, he risked very disagreeable consequences. He tried to withdraw the investment he had made, but was unable to get anything. The cash which he had on his person was taken away from him at the border, and he arrived in Paris without a cent. This was in 1923 when the laws were practically the same as now.

A set of decrees in somewhat the form of the present Code was drawn up and passed in the Spring of 1922, so that Russia might show to the nations of the world at the Genoa conference that legal rights were recognized and enforced within her domain. At that time an attempt was made to impress this system on the people and considerable publicity was given to some of the trials which were then held. I attended one such in the city of Samara, a town of about two hundred thousand population. The trial was widely heralded and was held in a theatre. Special tickets were required for admission and ushers were there to show spectators to their seats. The accused were a gang of thugs and cutthroats who had been rounded up by the local police. They were all seated in the pit which the orchestra usually occupied, while on the stage, which was elaborately decorated with red flags and communistic banners, were seated the three judges, the attorney general, counsel for the defense and assistant prosecutors. It was this same attorney general who had confirmed the appointment of the judges before whom he argued the case. The prisoners were required to testify, and they stood upon the box usually occupied by the leader of the orchestra and faced the court. The bailiff was a very tough looking individual with a gun strapped in a prominent place in his belt, and he stopped the proceedings every once in awhile to warn the "comrades" in the audience that if they didn't stop smoking they would be put out. The trial lasted about three days, and on the day after it was over about half of the gang were taken out and shot and the rest committed to prison.

Recently Krylenko, the Commissar of the Department of Justice has been insisting upon recognizing the old Russian law, as far as it is applicable to the new republic, and has been advocating the building up of a body of law which will serve as precedents for the future. He is vigorously opposed by some of the other communists who favor the deciding of each particular case upon its own merits, without reference to previous decisions. Whatever will happen in the future it is certain that at present the laws of Soviet Russia and the courts which interpret them are not constructed and designed, nor do they in actual fact serve, to bring about impartial justice. In fact they are not really intended to do so, and I know of no more fitting close to this discussion than a quotation which appeared in one of the Moscow newspapers in October of 1925 from the Attorney General of the Republic

(Concluded on page 808)

REVIEW OF RECENT SUPREME COURT DECISIONS

Important Constitutional Decision Upholds President's Exclusive Power of Removing Executive Officers of the United States Whom He Has Appointed With Consent of the Senate—Great Weight Attached to Views of Members of First Congress as to Question—Three Justices Dissent—Decision in Chemical Foundation Case Upholds Acts of President and Sales Effected by His Appointees Under Trading with the Enemy Act

By Edgar Bronson Tolman

Constitutional Law—Powers of the President—Appointment and Removal

A statute requiring the consent of the Senate to remove an inferior officer appointed by the President is unconstitutional because it invades the executive power of the President vested in him by Article II, Section 1, even though the Senate's consent is necessary to the appointment of such officer.

Lois P. Myers, Adm'x. of Paul S. Myers, v. The United States, Adv. Ops. 27, Sup. Ct. Rep. Vol. 47, p. 21.

The question presented by this case is whether under the constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed with the consent of the Senate.

A statute provided: "That the Postmasters shall be divided into four classes (based on annual compensation) . . . Postmaster of the first, second, and third class shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

Myers, the appellant's intestate, was appointed in 1917 by the President, by and with the advice and consent of the Senate to be a postmaster of the first class in Portland, Oregon, for a four-year term. In January, 1920, his resignation was demanded and on his refusal of the demand he was removed from office by order of the Postmaster General acting by direction of the President, in February of the same year. Myers pursued no other occupation and drew compensation from no other service until the end of his term. He then brought suit in the Court of Claims for the amount of his salary from the date of his removal until the end of his term.

The Court of Claims rendered judgment against Myers on the ground that he had lost his right of action because of delay in suing. The Supreme Court was appealed to and refused to put the case on this ground, saying through the Chief Justice:

> But we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement. A hearing before the Senate Committee could not be had till the notice of his removal was sent to the Senate or his successor was nominated. From the time of his removal until the end of his term, there were three sessions of the Senate without such notice or nomination. He put off bringing his suit until the expiration of the Sixty-Sixth Congress, March 4, 1921. After that, and three months before his term expired, he filed his petition. Under these circumstances, we think the suit was not too late.

The learned Chief Justice then stated the ground upon which he conceived that the case must be put, saying:

> The Senate did not consent to the President's removal of Myers during his term. If this statute in its requirements that his term should be four years unless sooner removed by the President by and with the advice and consent of the Senate is valid, Myers' administratrix is entitled to recover his unpaid salary for his full term and the judgment of the Court of Claims must be reversed. The Government maintains that the requirement is invalid, for the reason that under Article II of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without the consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal and the judgment of the Court of Claims against the appellant was correct and must be affirmed, though for a different reason from that given by the Court. We are therefore confronted by the Constitutional question and cannot avoid it.

He then proceeded to give a full discussion of the history of the power to remove and an elaborate statement of the reasons which led the majority of the court to hold that this power was vested in the President by virtue of the Constitution.

After stating the facts and issues the court set forth what it conceived to be the relevant parts of the Constitution, being Sections 1, 2, 3 and 4 of Article II, and Section 1 of Article III.

A considerable portion of the opinion is devoted to the view of members of the First Congress as to the question and considerable significance was attached to its view because of the fact that it numbered among its members many who had sat in the Constitutional Convention. The view of the legislative branch of the Government at this early period, 1789, was understood by the court to have been that the power here in question was vested in the President. The learned Chief Justice discussed the debates preceding the passage of a statute in which Messrs. Benson and Madison were interested. He said:

> It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson Impeachment trial in 1868, its meaning was not doubted even by those who questioned its soundness.

The opinion then proceeds to summarize the high points of the debate in Congress on the question, as follows:

> First. Mr. Madison insisted that Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of

executive officers except as thereafter expressly provided in that article. He pointed out that one of the chief purposes of the Convention was to separate the legislative from the executive functions.

Second. The view of Mr. Madison and his associates was that not only did the grant of executive power to the President in the first section of Article II carry with it the power of removal, but the express recognition of the power of appointment in the second section enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill, with only one or two exceptions, that as a constitutional principle the power of appointment carried with it the power of removal. Roger Sherman, 1 Annals of Congress, 491. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since (citing cases). The reason for the principle is that those in charge of and responsible for administering functions of government who selected their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint.

Third. Another argument urged against the Constitutional power of the President alone to remove executive officers appointed by him with the consent of the Senate is that in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of Article I.

Mr. Madison mistakenly thinking that an argument like this was advanced by Roger Sherman, took it up and answered it as follows:

"He seems to think (if I understand him rightly) that the power of displacing from office is subject to Legislative discretion; because it having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausibility. But when I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive and Judicial powers of government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I can not subscribe to it. . . . "1 Annals of Congress, 495, 496.

The learned CHIEF JUSTICE concluded his review of contemporaneous legislative construction, as follows:

> We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but first because of our agreement with the reasons upon which it was avowedly based, second because this was the decision of the First Congress on a question of primary importance in the organization of the Government made within two years after the Constitutional Convention and within a much shorter time after its ratification, and third because that Congress numbered among its leaders those who had been members of the Convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new Government would be based and would promptly evoke dissent and departure in future Congresses. It would come at once before the executive branch of the Government for compliance and might well be brought before the Judicial branch for a test of its validity. As we shall see it was soon accepted as a final decision of the question by all branches of the Government.

Next in order came a discussion of the effect of Marbury v. Madison, and of Parsons v. U. S. The former was declared to be but a dictum so far as the question involved here was concerned. This conclusion is in sharp contrast with the conclusion of the dissenting Justices, which will be hereafter referred to. The CHIEF JUSTICE, however, urged that even if Marbury v. Madison was more than *obiter dictum* it had been overruled by Parsons v. United States. In that case Parsons had been appointed District Attorney for a term of four years with no express power of removal provided. He was removed and sued to recover the balance due for his salary. He was denied recovery. In commenting on this case the learned CHIEF JUSTICE said:

> The language of the Court in Marbury v. Madison, already referred to, was pressed upon this Court to show that Parsons was entitled, against the Presidential action of removal, to continue in office. If it was authoritative and stated the law as to an executive office, it ended the case; but this court did not recognize it as such for the reason that the Chief Justice's language relied on was not germane to the point decided in Marbury v. Madison. If his language was more than a dictum and a decision then the Parson's case overrules it.

A considerable portion of the opinion is then devoted to a discussion of the views of contemporaneous lawyers on the point. It was pointed out that whatever was Marshall's view of the law in Marbury v. Madison, he later came to accept the legislative decision of 1789. The views of Kent, Hamilton and Story are also set forth which indicate that they accepted this decision as settled law despite any doubts that may have been entertained as to the soundness of its policy. Webster's changing views are attributed to the heated partisanship created by Jackson's abuse of the removing power. Space is devoted also to a brief outline of legislative acts which for seventy years followed and enforced the decision of 1789.

The learned CHIEF JUSTICE then adverted to the question whether the legislative decision of 1789 covered inferior as well as superior officers and concluded that it did and was so understood by Kent, Story and several Attorneys-General and it was so held in the Parsons case. He next considered the question whether the power of Congress to regulate removal of officers appointed by persons other than the President was analogous here and declared that it was not analogous, because the Congress is given power expressly by Article II Section 2 to vest such appointments in persons who have no executive power springing from the Constitution. Hence this power to remove is not unlimited.

He then summarized the position of the majority as follows:

> Our conclusion on the merits sustained by the arguments before stated is that Article II grants to the President the executive power of the Government, i.e. the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President in case of political or other difference with the Senate or Congress to take care that the laws be faithfully executed.

Next followed a brief discussion of the Tenure of Office Act enacted after the Civil War during the

controversy between President Johnson and the Congress. The prevailing opinion pointed out that this act was never accepted by the Presidents as constitutional and was never approved by the Supreme Court.

The learned CHIEF JUSTICE then concluded the opinion of the court by commenting on the great weight that should be attached to a legislative decision made under the extraordinary circumstances of that of 1789 by saying:

> This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years fixes the construction to be given its provisions.
>
> We are now asked to set aside this construction thus buttressed and adopt an adverse view, because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the States which attempted to withdraw from the Union at the time of the Civil War. The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government leading to articles of impeachment against President Johnson and his acquittal. Without animadverting on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century, especially when the new construction contended for has never been acquiesced in by either the executive or the judicial departments. . . . When on the merits we find our conclusion strongly favoring the view which prevailed in the first Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him and with the advice and consent of the Senate, was invalid and that subsequent legislation of the same effect was equally so.
>
> For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first class postmasters is denied to the President is in violation of the Constitution and invalid. This leads to an affirmance of the judgment of the Court of Claims.

It is of interest to consider as briefly as may be the dissenting opinions.

Mr. Justice McReynolds first stated the issues and certain important questions that appeared to him to be raised by the decision by implication. These questions show what he regarded as the dangers resulting from the rule laid down by the majority.

The learned Justice expressed a feeling of repugnance to the view that the executive can approve a statute and act under it and at the same time disregard express restrictions contained in it and went on to point out that it seemed extraordinary that so great a power should be granted by implication. With reference to this he said:

> Nothing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond Congressional control arbitrarily to dismiss every officer whom he appoints except a few judges. There are no such words in the Constitution and the asserted inference conflicts with the heretofore accepted theory that this government is one of carefully enumerated powers under an intelligible charter.

He then proceeded to state in summary form and criticize the contentions of the government in this case and said:

> For the United States it is asserted—Except certain judges, the President may remove all officers whether executive or judicial appointed by him, with the Senate's consent; and therein he cannot be limited or restricted by Congress. The argument runs thus—The Constitution gives the President all executive power of the national government except as this is checked or controlled by some other definite provision; power to remove is executive and unconfined; accordingly, the President may remove at will. Further, the President is required to take care that laws be faithfully executed; he cannot do this unless he may remove at will all officers whom he appoints; therefore he has such authority.
>
> The argument assumes far too much. Generally, the actual ouster of an officer is executive action; but to prescribe the conditions under which this may be done is legislative. The act of hanging a criminal is executive; but to say when and where and how he shall be hanged is clearly legislative.

Proceeding further, the learned Justice traced the history of legislation regarding postal affairs and argued that the inference that must be drawn from this history is that Congress has long regarded itself as having power to control removals and that the executives had generally approved the course.

From these historical considerations he turned once more to arguments based on logic and policy. The gist of these arguments is: First, that there is no supposed necessity for the power since the administration is carried on efficiently despite the fact that many inferior officers, being appointed by others, are not removable by the President; second, that the power can scarcely be illimitable since Congress can vest it in persons other than the President.

The next phase of the opinion is significant in throwing into relief the difference of opinion in the court as to the import of the legislative decision of 1789. The following quotations will perhaps serve to bring this out:

> Twenty-four of the fifty-four members spoke and gave their views on the Constitution and sundry matters of expediency. The record fairly indicates that nine, including Mr. Madison, thought the President would have the right to remove an officer serving at will under direct constitutional grant; three thought the Constitution did not and although Congress might it ought not to bestow such power; seven thought the Constitution did not and Congress could not confer it; five were of opinion that the Constitution did not but that Congress ought to confer it. Thus, only nine members said anything which tends to support the present contention, and fifteen emphatically opposed it. . . .
>
> Prior the year 1839 no President engaged in the practice of removing officials contrary to congressional direction. There is no suggestion of any such practice which originated after that date.
>
> Rightly understood, the debate and Act of 1789 and subsequent practice afford no support to the claim now advanced. In Marbury v. United States, supra, this court expressly repudiated it, and that decision has never been overruled. On the contrary, Shurtleff v. United States, 189 U. S. 311, clearly recognizes the right of Congress to impose restrictions.

A similar sharp difference of opinion in the court is found with respect to the interpretation of the decision in Marbury v. Madison, already mentioned. The learned Chief Justice said with reference to that case that it contained a statement which was certainly *obiter dictum* so far as it concerned the point here in question. The dissenting Justices, however, rejected this view, and Mr. Justice McReynolds said:

> The point thus decided (the power of the President to remove Marbury) was directly presented and essential to a proper disposition of the cause. If the doctrine now advanced had been approved there would have been no right to protect and the famous discussion and decision of the great constitutional question touching the power of the court to declare an Act of Congress without effect would have been wholly out of place. The established rule is that doubtful constitutional problems must not be considered unless necessary to determination of the cause. The sometime suggestion, that the Chief Justice indulged in obiter dictum, is without foundation. The court must

have appreciated that unless it found Marbury had the legal right to ccupy the office irrespective of the President's will there would be no necessity for passing upon the much controverted and far-reaching power of the judiciary to declare an Act of Congress without effect. In the circumstance then existing it would have been peculiarly unwise to consider the second and more important question without first demonstrating the necessity therefor by ruling upon the first. Both points were clearly presented by the record, and they were decided in logical sequence. Cooley's Constitutional Limitations, 7th Ed. 231.

But assuming that it was unnecessary in Marbury v. Madison to determine the right to hold the office, nevertheless this Court deemed it essential and decided it. I cannot think this opinion is less potential than Mr. Madison's argument during a heated debate concerning an office without prescribed tenure.

Mr. Justice McReynolds then discussed further authorities, particularly that of Parsons v. United States, and urged that the decision in it proceeds on the assumption the statute there in question did not purport to impose any restriction on the President's power to remove. He also discussed Shurtleff v. United States as an authority for the proposition that the removal power is not illimitable, because it recognizes that Congress may require notice and hearing as a condition precedent to removal.

The concluding argument of this dissenting opinion is that the executive power vested in the President is subject to limitations to be implied from the fact that the words granting the power are followed by an enumeration of particular powers. The learned Justice said:

> It is impossible for me to accept the view that the President may dismiss, as caprice may suggest, any inferior officer whom he has appointed with consent of the Senate, notwithstanding a positive inhibition by Congress. In the last analysis that view has no substantial support, unless it be the polemic opinions expressed by Mr. Madison (and eight others) during the debate of 1789, when he was discussing questions relating to a "superior officer" to be appointed for an indefinite term. Notwithstanding his justly exalted reputation as one of the creators and early expounder of the Constitution, sentiments expressed under such circumstances ought not now to outweigh the conclusion which Congress affirmed by deliberate action while he was leader in the House and has consistently maintained down to the present year, the opinion of this Court solemnly announced through the great Chief Justice more than a century ago, and the canons of construction approved over and over again.

Mr. Justice Brandeis' opinion is also elaborate. He likewise was unable to accept the views of the majority of the court as to the effect of Marbury v. Madison. In regard to this case he said:

> In Marbury v. Madison, . . . it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding.

Of the legislative decision of 1789 he said:

> It involved merely the decision that the Senate does not, in the absence of legislative grant thereof, have the right to share in the removal of an officer appointed with its consent and that the President has, in the absence of restrictive legislation, the constitutional power of removal without such consent. Moreover, as Chief Justice Marshall recognized, the debate and the decision related to a high political office, not to inferior ones.

The learned Justice vigorously argued that even though removal be admitted to be an executive act, the Constitution has confessedly given Congress the power to fix tenure and that since the fixing of conditions of removal is determining tenure, Congress has the power to prevent removal without the consent of the Senate.

He then stated his answer to the argument resting on the President's duty to execute the laws, saying:

> The end to which the President's efforts are to be directed is not the most efficient civil service conceivable, but the faithful execution of the laws, consistent with the provisions therefor made by Congress. A power essential to protection against pressing dangers incident to disloyalty in the civil service may well be deemed inherent in the executive office. But that need, and also insubordination and neglect of duty, are adequately provided against by implying in the President the constitutional power of suspension. Such provisional executive power is comparable to the provisional judicial power of granting a restraining order without notice to the defendant and opportunity to be heard. Power to remove, as well as to suspend, a high political officer, might conceivably be deemed indispensable to democratic government and, hence, inherent in the President. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government.

In answer to the argument of supposed necessity that this power should be vested in the President he further pointed out that the state governments function despite the widespread practice of limiting the removal power.

After enumerating the statutes of Congress requiring the consent of the Senate as a condition of removal and the cases where the Presidents have sought this consent, he said:

> From the foundation of the Government to the enactment of the Tenure of Office Act, during the period while it remained in force, and from its repeal to this time, the administrative practice in respect to all offices has, so far as appears, been consistent with the existence in Congress of power to make removals subject to the consent of the Senate.

The learned Justice then considered rather fully the logical consequences which result from a recognition of the principle that the power to remove is incidental to the power to appoint. He argued that an admission of this principle admitted the power of Congress to fix the conditions of removal, because it clearly has the power to fix conditions of appointments and to limit them to certain classes of persons.

A further point of interest is his view of the effect of a legislative practice long acquiesced in. Apropos of this he asserted that historical data established such a legislative practice of long standing and said:

> A persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary.

Finally he contended that the argument of the majority based on the theory of the separation of powers was not conclusive. With reference to this he said, in concluding:

> The separation of the powers of government did not make each branch completely autonomous. It left each in some measure dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial. Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or, because Congress, having created the office, declines to make the indispensable appropriation. Or, because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare Kendall v. United States, 12 Pet. 524, 613, 626.
>
> Checks and balances were established in order that this should be "a government of laws and not of men." As White said in the House in 1789, an uncontrollable power of removal in the Chief Executive "is a doctrine

not to be learned in American Governments." Such power had been denied in Colonial Charters, and even under Proprietary Grants and Royal Commissions. It had been denied in the thirteen states before the framing of the Federal Constitution. The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Mr. Justice Holmes delivered a brief dissenting opinion in which he concurred with Justices McReynolds and Brandeis. He said:

My brothers McReynolds and Brandeis have discussed the question before us with exhaustive research and I say a few words merely to emphasize my agreement with their conclusion.

The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depends on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

The case was argued by Messrs. Will R. King and Martin L. Pipes for appellant, by Solicitor General Beck for appellee, and by Mr. George Wharton Pepper as amicus curiae, by special leave of court.

Statutes—The Trading With the Enemy Act

The Act above referred to is a valid exercise of the power in war time to appropriate enemy property without compensation. It should be liberally construed to effectuate the exercise of that power. Its grant of power to the executive to carry its provisions into effect is not a delegation of legislative power. The orders of the President under the Act are valid and the sales effected by the President's appointees were effectual. The rule against purchases by fiduciaries at the sale conducted by them does not apply to the sale of enemy property in time of War to a corporation formed expressly to purchase such properties. The whole transaction was free from fraud.

United States of America v. The Chemical Foundation, Incorporated, Adv. Ops. 12, Sup. Ct. Rep. Vol. 47, page 1.

The United States brought suit in the District Court for Delaware to set aside sales to the Chemical Foundation of certain patents, copyrights, trademarks, etc., seized pursuant to the Trading with the Enemy Act of October 6, 1917, and later amendments thereto. It alleged as grounds for such action a combination and monopolization by a number of domestic manufacturers of the chemical industries of this country; conspiracy to bring about sales and transfers of the patents, etc., to them or to a corporation controlled by them, at nominal prices; and fraudulent deception of the President, the Alien Property Custodian and other officials in procuring such sales and transfers. The answer denied all these allegations and asserted the good faith and legal validity of the transfers. The District Court dismissed the complaint, the Circuit Court of Appeals affirmed the decree, and the United States Supreme Court also affirmed it with a slight modification as to costs. Mr. Justice Butler delivered the opinion. Justices Stone and Sutherland took no part in the case.

The learned Justice in his opinion briefly set forth the relation of chemical industries to the conduct of war, the situation in this country as regards such industries as a result of the blockade and, later, of our entry into the war, and the conferences held between representatives of Alien Property Custodian Palmer and representatives of the industries to protect the United States against enemy and foreign control of its chemical industries and to stimulate production here. These resulted in the plan, formulated under his direction, for the Chemical Foundation, which was incorporated in 1919 under the laws of Delaware, with power to purchase the enemy-owned patents seized by the Alien Property Custodian and to hold the same "in a fiduciary capacity for the Americanization of such industries," the exclusion of alien interests hostile or detrimental thereto, and the advancement of the chemical and allied interests in the United States; also to grant the United States non-exclusive license to make, use and sell the inventions covered by such patents and to grant like licenses on equal terms to American citizens and corporations under the control of American citizens. The shares of the Foundation were subscribed by those interested in the chemical and dye industries. The return of the shareholders, preferred and common, was limited to six per cent. and the voting power, which was limited to the common stock, was vested in five trustees. There was a board of three directors, made up of the President, Vice-President and Secretary and Treasurer of the Foundation. All directors, officers and voting trustees were chosen by or in accordance with the direction of Mr. Palmer, while he was Custodian.

The President, by executive order of December 3, 1918, declared that he "vested" in Frank L. Polk all the power and authority conferred upon the President by the provisions of Section 12 of the Trading with the Enemy Act as amended. Mr. Polk was then Counselor for the Department of State, but was not so described in the order. He thereupon made two orders, dated respectively February 26, 1919, and April 5, 1919, to authorize the Custodian to sell at private sale to the Foundation, without advertisement, at such places and upon such terms as the Custodian might deem proper, all patents, etc., relating to the purposes of the Foundation as expressed in its charter. These orders contained a statement of the reasons therefor in the public interest, among them being that the patents could not be sold to the best advantage at a public sale after advertisement; that the Foundation had been incorporated to hold the patents as a trustee for American interests affected by the patents and was obligated to grant non-exclusive licenses on equal terms to qualified American manufacturers and empowered to grant free licenses to the United States; that a private sale would prevent the patents from falling into the hands of people unable to use them and desiring them for purely speculative purposes, etc.

The first question taken up by the learned Justice was whether the act as amended March 28, 1918, empowered the President to authorize and the Custodian under his supervision to consummate these sales. He first quoted pertinent provisions of the act from Sec. 12 as amended, giving the Custodian all the powers of a common law trustee in respect of such property

and, in addition, full power, under the supervision and direction of the President, to deal with the property as though he were the absolute owner thereof, with the provision, however, "that any property sold under this Act, except where sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President, stating the reasons therefor, in the public interest shall otherwise determine." He then said:

> It is conceded that when seized the patents belonged to enemy Germans and that they were lawfully taken over by the Custodian. The purpose of the Trading with the Enemy Act was not only to weaken enemy countries by depriving their supporters of their properties (citing case), but also to promote production in the United States of things useful for the effective prosecution of the war. Section 10 (c) authorized the President, if he deemed it for the public welfare, to grant licenses to American citizens or corporations to use any inventions covered by enemy-owned patents. Subsection (c) of Sec. 7 of the Act as amended November 4, 1918, authorized the seizure of enemy-owned patents and provided that all property so acquired should be held and disposed of as provided by the Act. And there is no ground for contending that the seizure and transfers did not tend to lessen enemy strength and to encourage and safeguard domestic production of things essential to or useful in the prosecution of the war. . . . There is nothing to support a strict construction of the Act in respect of the seizure and disposition of enemy property. On the other hand, contemporaneous conditions and war legislation indicate a purpose to employ all legitimate means effectively to prosecute the war. The law should be liberally construed to give effect to the purposes it was enacted to subserve.

He called attention to the fact that Section 12 as originally enacted merely gave the custodian "all the powers of a common law trustee," and made him a mere conservator, with authorization to sell only to prevent waste. But a brief experience showed that these restrictions on the power to dispose of enemy property sometimes operated to defeat the purposes of the Act. The amendment removing such restrictions in the power of sale was therefore adopted. He continued:

> There is no support for a construction that would restrain the force of the broad language used. Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties (citing cases). And the act makes no provision for compensation. The former enemy owners have no claim against the patents or the proceeds derived from the sales. It makes no difference to them whether the consideration paid by the Foundation was adequate or inadequate. The provision that after the war enemy claims shall be settled as Congress shall direct conferred no rights upon such owners. Moreover the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals on account of the seizures and sales in question.

While not denying the power to confiscate enemy properties, the United States had argued that the provision above referred to was unconstitutional because it attempted to delegate legislative power to the Executive. But it was not necessary for Congress to ascertain or deal with each case. The Act went as far as was reasonably practicable under the circumstances existing:

> It was peculiarly within the provision of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power. . . .
>
> When the amended section is read in comparison with the original enactment and regard is had to the chemical warfare and other conditions existing at the time of the amendment, March 28, 1918, the inevitable conclusion is that it empowered the President to authorize, and the Custodian acting under him to consummate, the sales in question.

The United States also argued that the executive order of December 13, 1918, was void and that the order of February 13, 1920, did not authorize or ratify the transactions. The learned Justice called attention to the provision of the Act authorizing the President to exercise any power or authority thereby conferred through such officer or officers as he shall direct, observing: "Obviously, all the functions of his great office cannot be exercised by the President in person. The contention that power to determine how enemy property should be sold cannot be delegated is not sustained." (Citing cases.)

It was also argued that the order was not made in conformity with the statute because to "vest" power in another is not to "act through him," and because the order did not show that Mr. Polk was an officer. But if two constructions are possible, the learned Justice said, and one of them would render the order useless and the other give it validity, the latter is to be adopted. (Citing cases.) The intention to exert the power conferred under Section 5 was plain. Meticulous precision of language was not necessary. "While the use of the word 'vest' was not accurate, it must be deemed sufficient when the context and circumstances are considered." Nor was any particular form of designation as an officer required. Mr. Polk was in fact Counselor for the Department of State and "it would be unreasonable to read the order otherwise than as meaning that, in respect of the matters covered by Section 12, the President determined to act through Frank L. Polk, Counselor for the Department of State."

The learned Justice then briefly disposed of the attack on each of the orders made by Mr. Polk on the ground that they were too broad and constituted an attempt to give to the Custodian the very power granted the President by the Act—that is, the power to determine that specific properties should be disposed of otherwise than as specified in the proviso. He declared that the contention could not prevail as each of the orders sufficiently described the properties and authorized a private sale to the Foundation without advertisement. He continued:

> And it is insisted that the orders were induced by misrepresentation and were made without knowledge of the material facts. But both courts found that the United States failed to establish any conspiracy, fraud or deception alleged. Findings of fact concurred in by two lower courts will not be disturbed unless clearly erroneous. . . .
>
> Under this rule the findings must be accepted. The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.

The learned Justice then announced that "we agree with the lower courts that the sales and transfers were ratified and confirmed by the President's order of February 13, 1920." It had been urged that this was no ratification because it was not shown that the President had knowledge of the material facts; that he did not intend to ratify the sales of patents, and that the language used in the order was not broad enough to include the patents, trademarks and copyrights in question. A brief comparison of pertinent statements in

the Polk order and the President's order leads directly to this conclusion:

> The President will be presumed to have known the material facts and to have acted in the light of them. His intention to ratify the sales is plain. The comprehensive language used is broad enough to include the patents. Moreover the statement that his reasons for the determination are given in the Polk orders shows the intention to cover the properties there referred to.

The Government had further contended that the sales were void because made in violation of Section 41 of the Criminal Code, and the rule of law forbidding sales by a public officer or fiduciary of trust property in his custody to himself or to a corporation of which he is the head. Section 41 forbids any officer or agent of a corporation or any person directly or indirectly interested in the pecuniary profits, etc., to act as an officer or agent of the United States for transaction of business with such corporation. The learned Justice assumed, in favor of the United States, that those who acted for it in the transactions in question were at the same time directors and officers of the corporation; that the members of the Advisory Sales Committee, while they were voting trustees, participated in fixing the prices to be paid for the patents, and that such prices were less than the value of the properties. Still the proceedings were not in violation of the section:

> Section 41 was enacted when there was no war, and long before the Trading with the Enemy Act. It lays down a general rule for the protection of the United States in transactions between it and corporations and to prevent its action from being influenced by anyone interested adversely to it. It is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose. (Citing cases.)
>
> At the time of the enactment there were no enemy properties to be dealt with; and, save the generality of the language used, there is nothing to indicate a legislative purpose to deal with that subject. The Trading with the Enemy Act is a war measure covering specifically, fully and exclusively the seizure and disposition of enemy properties.

Furthermore, there was no question that the authority of the President to authorize sales and to determine terms and conditions included the power to cause the Chemical Foundation to be incorporated for the purposes above mentioned and to direct the election of the directors, officers and voting trustees. None of those who acted for the United States had any financial interest in the Foundation, its profits or contracts. The whole arrangement, in brief, was intended to amount to a public trust for those whom the patents would benefit and for the promotion of American industries, and to give them the right to have on equal and reasonable terms the inventions covered by the patents. In other words:

> The Foundation is properly to be considered an instrumentality created under the direction of the President to effect that disposition and subsequent control of the patents which he determined to be in the public interest. The transactions complained of did not involve any of the evils aimed at by section 41. The act will be construed and applied as not qualified or affected by that provision of the criminal code. (Citing cases.) And, as the power to dispose of the properties by sales on the terms and conditions specified was included in the grant made by the statute, it follows that the rule in respect of sales of trust properties by fiduciaries does not apply.

The case was argued by Special Assistant to the Attorney General Henry W. Anderson, and Assistant to the Attorney General, Herman J. Galloway, for the Appellant, and by Hon. John W. Davis for appellee.

Illinois

Chairman of Important Commission Welcomed Home

Hon. Silas H. Strawn of Chicago, who has recently returned from China as delegate of the American Government to the Special Conference on Chinese Customs and as Chairman of the International Commission on Extra-territorial jurisdiction in China, was given a rousing "welcome home" dinner on Oct. 22 by the Chicago Bar Association. President Boyden introduced the distinguished guest and fellow member to the Association, after which Mr. Strawn spoke on his trip and work in China. He found it of course impolitic to disclose in advance of publication the report which had been submitted to President Coolidge, but from the general tenor of his remarks it was quite evident that in his opinion the time had not yet come to abolish extraterritorial jurisdiction on the flowery kingdom. His remarks on the chaotic condition of affairs in China, where the militarists hold control of various areas and administer affairs with sole reference to their need for supplies, gave a valuable insight into the actual facts of the situation. During the course of the dinner various songs of original composition were sung by the Glee Club, under the leadership of Mr. John D. Black, specially assisted by Mr. Bruce Johnstone and Mr. Archibald Cottell.

Kansas

Judicial Council in Kansas

(By Hon. J. C. Ruppenthal in Grinnell, Kan. Record)

When the Bar Association of Kansas meets at Topeka in November it will have before it for consideration as the most prominent topic, the matter of a Judicial Council. Some of us lawyers have for years been persuaded that there is a large amount of administrative work always to be done by courts and their judges, and that there is little semblance of order, system, unity or co-operation in such work.

About five years ago, Ohio started to bring order out of chaos by providing a judicial council under a new act of the legislature. Four or more other states have followed suit. Many are considering the matter. If the principle meets approval of the state bar association, the question will go to our legislature of 1927.

Kansas has much need of such "liaison" organization, as we called such movements in the world war. We have seven courts—district probate, juvenile, county, city justice of the peace, police and no band or bond among them to assure common standards in administrative matters, and not much even in certain judicial features. We can hardly expect the average person to have the high respect for courts that every citizen should have, so long as there is such medley of courts, such diversity of practice, such variations of learning, skill, ability and experience among them. Then too a Judicial Council would likely get facts as to our court work, and reliable facts are almost unknown now, and ever have been among us.

Missouri

State Bar Elects Officers

Dean I. P. McBaine of the Law School of the University of Missouri, Columbia, Mo., was elected President of the State Bar Association at the recent meeting held at Kansas City. President McBaine was introduced at the banquet which concluded the meeting by the retiring president, Hon. John T. Parker. Dean McBaine in a brief talk emphasized the opportunity which was presented to the association to render a public service by the encouragement of higher standards of legal education, in which respect the state had made little progress in the last twenty years. He added that he did not subscribe to the cry that we do not need more laws. "We need new laws, particularly in revamping our criminal code. We don't need more bad laws."

Other officers elected at the annual meeting were: Vice-Presidents: Clarence A. Barnes, Mexico; David E. Impey, Houston; Lee B. Ewing, Nevada. Secretary, J. H. Potter, St. Louis; Treasurer, J. T. King, St. Louis; member of Executive Committee, Murat Boyle, Kansas City.

New York

Press Criticism of Bar Associations Answered

At a stated meeting of the Association of the Bar of the City of New York, held on October 13, President William P. Guthrie made the following pertinent observations on current charges in the Press of New York City against lawyers practicing in the criminal courts and against Bar Associations for their alleged indifference to their duty in the premises:

"3. The State Crime Commission will be called upon to investigate current charges in the Press against lawyers who practise in the courts of criminal jurisdiction. These charges are usually sweeping generalizations that professional misconduct is prevalent, and they are alleged to be common in all criminal courts; but usually these charges are without any specific instances or facts or evidence; and they are to the effect that lawyers practising in these courts are frequently engaged in suborning perjury, in manufacturing defenses, in making false statements to the court, and in delaying or preventing trials by unlawful and improper practices of a dilatory nature. It has also been unjustifiably asserted that the Bar Associations are indifferent to their duty in failing to suppress these illegal and improper practices and in omitting to discipline and punish offending lawyers.

"As is, of course, well-known to us lawyers, under the Judiciary Law of this State the Appellate Division has ample power and control over attorneys and counsellors at law in respect of every form of wrongful acts by members of the profession, and indeed in respect of every form of professional conduct of whatever nature on the part of lawyers which is prejudicial to the administra-

tion of justice; and it has long been the invariable practice of the Appellate Division in this Department to act promptly and vigorously upon all complaints submitted to it, generally by referring them in the first instance to this Association for investigation and prosecution by its Grievance Committee. The Appellate Division also has full power to refer such complaints to the District Attorney, or to referees. Moreover, whenever a trial judge is satisfied that perjury has been committed on a trial before him, it is the practice of our judges to refer such matters at once to the District Attorney, whose duty it then becomes to investigate and, if necessary or advisable, to prosecute. There can be no professional misconduct of any kind that cannot be punished either in the criminal courts or by disciplinary proceedings before the Appellate Division. All that is necessary is a complaint of a specific offense, whether of perjury, manufacturing defenses, false statements to the court, or other professional misconduct, in order to secure prompt action by the trial judge, the District Attorney, the Appellate Division, the Grievance Committee of this Association, or the Committee on Discipline of the New York County Lawyers' Association; and prompt investigation and, if warranted, prosecution will thereupon follow.

"In regard to the grave charge of suborning perjury, I made particular inquiries of the Chairman of our Committee on Criminal Courts, Law and Procedure, Mr. Perkins, who has had close relations and practical experience for many years with the criminal courts, and he has stated to me as follows:

"'Whilst it is true that a guilty defendant who takes the stand will often commit perjury, it needs no suggestion or suborning from his lawyer to induce such perjury. I believe that in most of these cases the perjury is in accord with statements which the defendant has made to his lawyer and which he has insisted are true.

"'False testimony by witnesses for the defendant in criminal cases, according to my observations covering many years and numerous cases, is generally either given out of friendship, loyalty, or self-interest, or else is directly induced and fabricated by the defendant himself or his associates or relatives, and generally in both classes of cases without the knowledge of his lawyer. I do not mean to say that no lawyer ever suborns false testimony; but I am convinced that it is seldom done by members of the profession; and I have never seen reason to believe that it is common in any large proportion of the criminal cases tried in this county.

"'Moreover, if perjury be committed during the course of a criminal trial, the prosecutor trying the case and the judge presiding at the trial surely ought to be able to detect it, and in such cases they not only have the duty of seeing that perjury does not go unpunished, if punished it can be, but they usually also take a direct personal interest in procuring such punishment. I say punished if it can be, because a great deal of perjury is not punishable under the present state of our law, if, for example, the testimony is not technically material, or if it be corrected on cross-examination by confession of the truth, or if there be only a single witness who can testify to the contrary on the trial for perjury. The District Attorney, with full and far-reaching power of subpoena in New York County and with a Grand Jury always in session, can immediately initiate a secret investigation with compulsory process, and all the facilities and resources of his powerful office are at his command. Indeed, it is his custom to do so in cases of perjury or suspected subornation whenever he feels that there is reasonable ground to believe that a prosecution can be successful.

"'I should add that, ordinarily, if the falsity of testimony cannot be or is not established during the course of a criminal trial, it cannot be established later, except, of course, where such testimony has been a surprise to the prosecution. If lawyers are knowingly offering false testimony and the District Attorney and trial judge do not or cannot detect it and are not, therefore, called upon to see to it that the offense is promptly punished, I cannot see how our Bar Associations can reasonably be expected to do so. They certainly cannot be expected to have representatives attend and watch all criminal trials or to maintain a staff of detectives to investigate all suspicious cases. They lack the great facilities of the District Attorney's office, and they cannot, moreover, proceed without specific instances being called to their notice. So far as I have heard, District Attorney Banton has never been or would not be remiss in prosecuting for the offense of perjury if facts, brought to his attention by anyone, reasonably tended to show that this grave offense had been committed.

"'As to dilatory tactics of lawyers for the defense in criminal cases, it should be observed that if such tactics are improper and unauthorized under established rules, they either can be readily prevented by the trial judge or the District Attorney, or can be punished as violations of law, or, if not so punishable can be referred to the Appellate Division or the Grievance Committees of the Bar Associations for investigation and disciplinary prosecution. The District Attorney controls his calendar, and he can generally try his cases as soon as he is ready. As matter of fact, he does so try them now, and I understand that the criminal calendars are today in such condition that indictments are disposed of with great celerity and that the courts accept only legal excuses whenever delay is opposed by the District Attorney.'

"Our standing Committee on Grievances, consisting of nine members, has long been the most active, industrious and prominent committee of the Association, and it has long rendered exceptionally able and efficient public service in connection with cases of alleged professional misconduct. It considers and investigates every class of complaint of professional misconduct, including misconduct in connection with criminal cases. In fact, its practice is to give preference and, if possible, immediate attention to all complaints submitted to it for investigation by the District Attorney or by any of the courts.

"The Grievance Committee during the past fifteen years has investigated over 14,000 complaints, and during that period 201 attorneys have been disbarred, 57 have been suspended and 41 have been censured in proceedings instituted and conducted by this Association. . . .

"The expense of conducting the business of the Grievance Committee has been for many years a heavy pecuniary burden upon this Association, amounting last year to over $17,000, and during the past fifteen years to over $200,000. It maintains an office of several rooms in the house of the Association, which is open every business day, where its current work of receiving and investigating complaints is transacted. It maintains a paid staff whose time is exclusively devoted to the work of the committee. The office is in charge of the attorney for the committee, and his force consists of two assistant attorneys, two clerks and two stenographers. At times the number of complaints necessitates the employment of a third assistant attorney. In addition, an experienced law stenographer is employed to report the meetings of the committee. The committee also frequently avails of the services of members of the Association in the presentation and prosecution of charges at the trials before the referees, which are often protracted, and before the Appellate Division upon presentation of the reports of the referees. These members serve without compensation. . . .

State Association of Magistrates Meet

(From Syracuse, N. Y. Journal)

Ideas on domestic relations courts and their jurisdiction were exchanged at the opening session of the eighteenth annual conference of the New York State Association of Magistrates at the Hotel Syracuse.

About 50 judges from various cities of the state attended the session and heard Judge George L. Hager, Buffalo, and Judge Edward J. Dooley, Brooklyn, who both preside in domestic relations courts, discuss phases of their work. Judge Hager and Judge Dooley have had years of experience in settling family difficulties and abandonment cases in court and their addresses were loudly applauded by the other magistrates.

Judge Hager, in an address on "Jurisdiction and Procedure in Domestic Relation Cases," described the working of his court in Buffalo. The domestic relations court in that city, long presided over by Judge Hager, has served as a model for numerous other cities to follow.

Judge Dooley described some of his experiences in New York City.

The question of jurisdiction of magistrates in the smaller cities and villages was discussed. Judge Alexander J. Byrne, Seneca Falls, said in his opinion he had as much jurisdiction as a judge in New York City or in Buffalo and that he could not see why it is that justices of the peace are inclined to complain against the amount of their power. The code applies to all judges, he said in conclusion.

Judge Leo J. Yehle, of Syracuse, gave the address of welcome. He explained that although new on the bench and not a member of the association he felt the conferences had a high educational value and that it was with pleasure that he welcomed fellow magistrates to Syracuse. Judge Yehle was loudly applauded by the magistrates.

Judge John T. Buckley, Utica, president of the association, presided. Judge Buckley will probably be succeeded as president by Judge Philip G. Klem of Herkimer.

The conference is in charge of Edward H. Toole of the State Probation Commission.

There is an apparent discrepan

The pages are either missing or

The filming is recorded as the

epancy at this point.

ng or the pagination is incorrect.

the book is found in the collections.

Oregon

Important Measure Approved at Oregon State Meeting

(From Eugene, Oregon, Register)

"Lessening of delays in court procedure and more complete representation of the courts will result if two measures, approved at the annual meeting of the state bar association, are passed," said Dean W. G. Hale of the university law school who returned here yesterday after attending the session.

Two important measures were agreed upon by the members of the association, Dean Hale states. One proposes to move the power of control over court rules and regulations from its present place in the legislative department to the judicial department. This point has been a subject of discussion for many years, the dean says, but this year is the first time an agreement has been reached.

The second measure provides that membership in the state bar association becomes automatic with membership in a local bar association. This ruling will go into effect July 1, 1927.

The Judicial System of Soviet Russia

(Continued from page 797)

of the Ukraine. He said in connection with the codification of laws upon which the Soviet jurists are now working:

> Our enemies think that on this problem the Soviet authority will break its neck. They imagine that with the introduction of firm legal principles the Soviet Government will gradually develop into a bourgeois democratic authority. These hopes are without foundation, because we are the sentinels not of common justice but of "revolutionary justice." Our laws are created for defending the class interests of the workingmen and peasants and for insuring the normal development of our socialistic structure. Therefore, our revolutionary justice, unlike the formal bureaucratic legal system, is a live social power.

REFERENCES USED IN PREPARATION OF THE JUDICIAL SYSTEM OF SOVIET RUSSIA

Commercial Year Book Soviet Union 1925, containing constitution of the U. S. S. R., and, on page 411, short account legal system.

"Administration of Justice in Soviet Russia," by Borris M. Komar, Virginia Law Review, Vol. 10, No. 5 (March, 1924), page 337.

Speech, Hon. Wm. H. King in the U. S. Senate, entitled "Conditions in Russia," delivered January 22 and April 24, 1924, pages 89 and 90.

"The Judicial System of Russia," by Harry M. Fisher, Journal of American Bar Association, May, 1921, page 213.

"Laws of Soviet Russia," American Bar Journal, by Isaac C. Hourwich, page 229.

"The Judicial System of Russia," by A. Epstein, in The Nation, Vol. 115, pages 315-18 (Sept. 27, 1922).

"Justice Under Bolshevism," Contemporary Review, Vol. 117, pages 861-78 (January, 1920).

"Soviet Courts in Action," Current History, Vol. 13, No. 2, pages 295-8.

Decree of Russia's Law Courts, published in The Russian Review, Vol. 1, Nos. 1-6, from Sept. 12, 1923, to Nov. 15, 1923.

The Civil Code of Russia, published in above numbers of the Russian Review, and continuing through the greater part 1924.

The Criminal Code of Russia, published in London.

Speech, Senator Borah in the Senate on February 21, 1922, Congressional Record, page 4194.

"Soviet Courts," The Docket, page 2735 (1923).

Series of articles, Isaac Marcosson, appearing in Saturday Evening Post, December, 1924, to February, 1925.